A TREATISE

ON

HINDU LAW

BY

GOLAPCHANDRA SARKÁR, SÁSTRÍ, M.A., B.L.,

VAKIL, HIGH COURT, CALCUTTA

Author of the English translations of the Dáya-tattva and the Viramitrodaya, joint author of the English version of the Vuddha-ratnákara, Sanskrit Commentaries on Hindu Law, formerly Professor of Law, Metropolitan Institution, Fellow, Calcutta University, Sometime Tagore Professor of Law, and Author of the Tagore Lectures on the Hindu Law of Adoption, Sometime Dean of the Faculty of Law of Calcutta University, Professor of the University Law College, Calcutta &c., &c., &c.

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TO

Edward Byles Cowell, Esq., M. A.

Professor of Sanskrit, Cambridge, Sometime Principal Sanskrit College and Professor Presidency College, Calcutta.

THIS BOOK

IS

DEDICATED

AS AN HUMBLE TRIBUTE OF GRATITUDE

for his unfailing kindness and generous encouragement to the students placed under his care in India,

AND

AS A SMALL TOKEN OF THE SINCERE RESPECT

for his memory which is treasured up in the minds of the Indian students with feelings of Affection and Reverenee,

By one of them,

Specially benefited,

THE AUTHOR.

उत्सर्गः

परमभट्टारक-श्रीलश्रीयुक्त इ. बि. काउएल—

परमाराध्य-गुरुदेव-महोदय—

करकमलेषु

प्रज्ञानिधे प्रकृतिसौम्य महर्षिमूर्त्ते
हे भारतीतनयरत्न गुरो नमस्ते ।
हित्वा चिरं वससि यद्यपि नः सुदूरे
त्वं नस्तथापि हृदयानि जहासि नैव ॥

अस्माकमाराध्यतमो गुरुस्त्वं
शिष्या वयं ते सुतनिर्विशेषाः ।
अस्माकमेवं स्पृहणीय आस्तां
सम्बन्धबन्धो जननान्तरेऽपि ॥

विना भवन्तं तव पुत्रकोऽह
कस्मै मदीयां कृतिमुत्सृजामि ।
स्व-हस्त-संवर्द्धित-पादपस्य
फलं यथा ग्रन्थमिमं गृहाण ॥

कलिकाता ।
१८१८ शकाब्दाः
ज्यैष्ठः ।

प्रणत-भक्त-सेवकस्य
श्रीगोलापचन्द्र-शास्त्रिणः

PREFACE TO THE FOURTH EDITION.

After the publication of the last edition of this work, some cases involving important questions of Hindu law were decided by the highest courts ; these had to be noticed and discussed in their proper places, and certain new matters connected with different subjects had also to be added in this edition, and it became necessary to revise the book : but owing to several adverse circumstances the work of revision could not be, and has not been, done as well as I desired.

One of the cases may be noticed here as being a decision of special importance by reason of its connection with Hindu religion which has still a strong hold on the mind of Hindus, and is exercising its beneficial and elevating influence over their society. The case was decided by a Full Bench of five learned Judges of the Calcutta High Court, and the constitution of the Bench was most satisfactory from all points of view ; it was referred for decision to a Full Bench by Justice Saradacharan Mitra who dissented from the prevailing judicial view held in recent cases, but by the time the case came to be heard by the Full Bench, that learned Judge had ceased to be a judge of the High Court by the operation of an inexorable rule against Judges of more than sixty years of age. This is no doubt a matter of regret, but the constitution of the Bench was such that the absence of Justice Mitra was not felt at all.

The Bench appears to have been constituted by the Chief Justice after consideration : it consisted of two learned judges representing the prevailing judicial view of the question, namely, Justices Stephen and Coxe who had been parties to decisions in which that view had been taken ; of two Hindu Judges representing the Hindu view of the question, namely, Justices Asutosh Mukhopádhyáya and Digambar Chattopádhyáya who are highly qualified for correctly expounding questions of Hindu law, and, lastly, of the eminent Chief Justice Sir Lawrence Jenkins whose pre-eminence as a profound lawyer and an independent and impartial Administrator of Justice, is universally admitted.

The question was—Whether a devise by a Hindu of property for the purpose of perpetually maintaining the worship of the Deity—by means of an Image in the female form of *Kálí* representing the *divine attribute* of Destruction as distinguished from those of Creation and Preservation—to be established

and consecrated by the Executor after the death of the Testator, and for the purpose of helping the poor by the distribution of food &c.—was valid or not?

The current judicial answer given in some recent cases was in the negative, by applying to the gift the principle of the Tagore case relating to gifts to *unborn persons*, upon the analogy that as juridical person the consecrated image was a legatee not in existence at the testator's death. But the Full Bench unanimously held the devise to be valid, and the principle of the Tagore case to be inapplicable to the same. This decision has given very great satisfaction to the Hindus by removing the slur cast on their consecrated images by the decisions in which consecration of an image was held to be tantamount to birth of a human being.

My thanks are due to Babu Surendrachandra Sen, B.A., B.L., for revising the Contents for this edition.

20, Sankharitota East,
ENTALLY P. O.
Calcutta, 15th July, 1910.

G. S.

TABLE OF CASES.

ABBREVIATIONS.

B. H. C., or B. H. C. R. — Bombay High Court Reports.
B. L. R. = Bengal Law Reports.
Ch. D. = Chancery Division, See under L. R.
Cl. & F. = Clark & Finnelly, H. R. 1831-46.
D. B. — Dáyabhága.
D. T. — Dáyatattva.
H. L., A. C. = House of Lords, Appeal Cases.
Hyde = Hyde's Reports.
I. A. — Law Reports, Indian Appeals.
I. L. R., A. = Indian Law Report, Allahabad Series.
I. L. R., B. = Indian Law Report, Bombay Series.
I. L. R., C. = Indian Law Report, Calcutta Series.
I. L. R., M. — Indian Law Report, Madras Series.
L. J. — Calcutta Law Journal.
M. H. C., or M. H. C. R. = Madras High Court Reports.
M. I. A. — Moore's Indian Appeals.
M. L. J. = Madras Law Journal.
Mer. = Merivale, Ch., 1815-17.
Mit. — Mitákshará.
Vír. — Víramitrodaya.
W. N. — Calcutta Weekly Notes.
W. R. — Southerland's Weekly Reporter.
W. & T. — White and Tudor's Leading Cases.

ADDENDA.

I have been asked by some friends, and I think it proper, to state the circumstances under which I expressed what I subsequently discovered to be an erroneous view on the subject of the effect of adoption on the adopted son's right to property inherited from the natural father before adoption, and also the circumstances under which the error was discovered.

I delivered the Tagore Lectures on the Hindu Law of Adoption in 1888, but had not written out the lectures before delivery, but had prepared a mere Synopsis of the topics of the subject, arranged and divided under twelve heads, that should be discussed in the work, and a few notes on each topic. The lectures ought to have been published within six months of the delivery according to the direction of the founder of the Tagore Law Professorship, but as nevertheless a practice contrary thereto had grown up of delaying the publication, I was preparing the work in a leisurely way, the progress being also retarded by ill-health. But in June 1890 when only four lectures out of eight then ready for the press, had been printed, and the remaining four were still in an incomplete state, I received a letter from the then president of the Faculty of Law of the Calcutta University, calling my attention to the founder's direction, and requiring me to publish the work without delay. I was thus compelled to hurry on and complete the work without proper research with respect to all matters contained in the last three or four lectures.

As regards an adopted son's right to property inherited by him before adoption, what I stated in that work was deduced from the general principles enunciated in the Blindman's son's case, and in the Unchastity case. The special rules laid down by Manu and the Commentators were completely overlooked by me. And the oversight and error were brought to my notice under the following circumstances.

After the report of Mr. Justice (now Right Honourable) Amir Ali's judgment had been published in 1 Calcutta Weekly Notes p. 121,—holding that under the Dayabhaga School an adopted son is not divested of the property inherited by him *before* adoption from his deceased natural father or other natural relation by his subsequent adoption,—I was informed in November, 1896 by Babu Saratchandra Khan then a junior vakil of our High Court that during the previous long vacation

he had a discussion with a learned Pandit on the question of the effect of adoption on an adopted son's rights to property inherited by him in the family of birth before adoption, and that the Pandit expressed surprise on hearing that I had stated in the Tagore Lectures on the Hindu Law of Adoption that there was no authority in Hindu Law to support the position that an adoption operated as civil death and extinguished the adopted son's rights to property inherited in the family of birth before adoption; and that the Pandit requested him to draw my attention to Manu's texts on the subject and the explanation of them given by the commentators. The young pleader explained to me the Pandit's view of the texts and satisfied me that the matter is worthy of enquiry and study.

On persuing Manu's texts (pp. 121—122 *infra*) and the interpretation of the same by the commentators I found that there is ample authority in Hindu Law for the position that an absolute adoption, like renunciation of the world, disregard of temporal matters, or degradation, operates as civil death of the adopted son and causes extinction of his existing rights of property in the family of birth and opens succession to his then heirs.

Manu (ix, 142) says that the Dattaka son does not take away the *gotra* and the *riktha* of his natural father when he passes from the family of birth to the family into which he is adopted: the term *gotra* in this text means, not family, but the status of sonship to the natural father, and *riktha* means property inherited from the natural father, and not the right to inherit property in future. The two terms *gotra* and *riktha* form one *conjoint* word in original, and are equally connected with the other words in the sentence—and the purport is that as the adopted son's relation as son of the natural father becomes extinguished by adoption, similarly his relation to the property inherited from the natural father becomes also extinguished, *i.e.*, his existing proprietory right in the natural father's estate ceases. This is the explanation given by all the commentators including the authors of the Dattaka-Mímánsá and the Dattaka-Chandiká.

It is clear therefore that the view expressed by me in the Tagore Lectures as one deducible from general principles, was not correct, inasmuch as the special provisions of law bearing on the question was not only not taken into consider-

ation at all, but it was erroneously thought and stated that there was no such authority in Hindu law. It is a matter of very great regret that the authorities on the subject escaped my attention at the time that part of the Tagore Lectures was compiled in a hurry and in a perfunctory manner. My present opinion was embodied in the second edition of this treatise for the first time, as the chapter on Adoption in the first edition had been printed before the error was discovered.

This very question arose in two recent cases in Madras one in the Court of the Subordinate Judge of the Kristna district, and the other in the Court of the District Judge of Godavery. The former case was decided in December 1899, by the Sub-Judge who relied on and followed Justice Amir Ali's decision, and also referred to the view expressed in the Tagore Lectures; while the other case was still pending and had made very little progress. The parties to the two cases were the same.

Sri Raja Rangayya Appa Rao who had lost the case before the Sub-Judge sent an officer and a local lawyer in June or July 1900 to Calcutta for consulting Mr. J. T. Woodroffe the then Advocate General of Bengal, and for retaining him to argue the appeal preferred in the Madras High Court against the decision of the Sub-Judge. The pleader submitted to him the texts of law and the arguments furnished by learned Pandits in support of the position that an adopted son becomes divested of property inherited from the natural father at the same time when he becomes divested of his status of sonship to him.

The Advocate-General who had the kindness to consult me whenever he felt any doubt or difficulty with respect to questions of Hindu law, and knew me very well, advised the party to take my opinion on the question, after drawing my attention to the texts and the arguments, notwithstanding their objection to consult me on the ground that I had already expressed an adverse opinion, but without noticing the texts relied on by them.

They came to me in July 1900. The pleader placed before me the texts, but appeared to feel some delicacy to say that the opinion expressed by me was opposed to them, when they were agreeably surprised to learn that I had already considered them all, and changed my opinion. They then disclosed how they came to me against their own inclination and the client's original instruction, and requested me to give a written opinion referring to all the authorities, and to give

English translation of such of them as had not been done into English.

The opinion given by me was shown to Mr. Woodroffe, and a conference was arranged to which he and Woodroffe junior (Mr. J. G. Woodroffe now Justice Woodroffe) and myself were parties, I explained the correct meaning of the terms in the text of Manu, and how that text and the law on the question were explained by the commentators: and the Advocate-General was convinced that according to the right view of the law, an adoption operates as civil death of the adopted son, as regards his proprietory rights in the family of birth.

Armed with my written opinion, the Raja wanted to convert it into judicial evidence for the purpose of using it against my opinion in the Tagore Lectures, and accordingly he cited and examined me as an expert witness in the case pending in the Court of the district judge of Godavery. My evidence related chiefly to the English translation of the Sanskrit texts, and to my present opinion. But the Madras High Court have not accepted either my present opinion or my translation of Manu's text (ix, 142); nor have they accepted the translation of that text given in the Edition of Manús Code as one of the Sacred Books of the East Series. See I.L.R.,29 M. 437.

HINDU LAW.

CHAPTER I.

INTRODUCTORY.

ORIGINAL TEXTS.

N.B.—*The words in Italics are not in the original texts, but are explanatory additions.*

१ । अहं प्रजाः सिसृक्षुस्तु तपस्तप्त्वा सुदुश्चरम् ।
पतीन् प्रजानाम् असृजम् महर्षीन् आदितो दश ॥
मरीचिम् अत्र्यङ्गिरसौ पुलस्त्यं पुलहं क्रतुम् ।
प्रचेतसं वशिष्ठञ्च भृगुं नारदम् एव च ॥
इदं शास्त्रन्तु कृत्वासौ माम् एव स्वयम् आदितः ।
विधिवद् ग्राहयामास मरीच्यादींस्त्वहं मुनीन् ॥
एतद् वोऽयं भृगुः शास्त्रं श्रावयिष्यत्यशेषतः ।
एतद्धि मत्तोऽधिजगे सर्व्वम् एषोऽखिलं मुनिः ॥

मनुः । १ । ३४, ३५, ५८, ५९ ॥

1. Being desirous of creating beings, I *Manu* performed very difficult religious austerities, and at first created ten Lords of beings, who were great Rishis *or sages eminent in holiness*, namely, Maríchi, Atri, Angirás, Pulastya, Pulaha, Kratu, Prachetás, Vasishtha, Bhrigu and Nárada. (Manu, i, 34-35.) He *the self-existent* having made this Shástra *i.e., Code of Manu*, himself taught it regularly to me *Manu* in the beginning: afterwards I taught Maríchi and the other holy sages. This Bhrigu will repeat to you this Shástra without omission; for, this sage learned from me the whole of it, perfectly well.—Manu, i, 58-59.

२ । वेदः स्मृतिः सदाचारः स्वस्य च प्रियम् आत्मनः ।
एतच्-चतुर्विधं प्राहुः साक्षाद्-धर्म्मस्य लक्षणम् ॥

मनुः । २ । १२ ॥

2. The Veda, the Smriti, the approved usage, and what is agreeable to one's soul *or good conscience, where there is no other guide*, the

wise have declared to be the quadruple direct evidence of Dharma *or law and other means of securing good.*—Manu, ii, 12.

३ । श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियम् आत्मनः ।
सम्यक् सङ्कल्पजः कामो धर्म्ममूलम् इदं स्मृतम् ॥

याज्ञवल्क्यः— १ । ७ ॥

3. The Sruti, the Smriti, the approved usage, what is agreeable to one's soul *or good conscience* and desire sprung from due deliberation, are ordained the foundation *or evidence* of Dharma.—Yájnavalkya, i, 7.

४ । पुराण-न्याय-मीमांसा धर्म्मशास्त्राङ्गमिश्रिताः ।
वेदाः स्थानानि विद्यानां धर्म्मस्य च चतुर्दश ॥

याज्ञवल्क्यः—१ । ३ ॥

4. The *four* Vedas, together with their *six* Angas *or subsidiary sciences*, the Dharma-shástras *or Codes of Law*, the Mimánsá *or disquisition* of the rules of scripture, the Nyáya *or science of reasoning or rules of interpretation*, and the Puránas *or records of antiquity*, are the fourteen sources of knowledge and Dharma.—Yájnavalkya, i, 3.

५ । द्वे विद्ये वेदितव्ये, इति ह स्म यद्-ब्रह्मविदो वदन्ति, परा चैवापरा च ॥
तत्र अपरा,—ऋग्वेदो यजुर्वेदः सामवेदोऽथर्ववेदः, शिक्षा कल्पो व्याकरणं निरुक्तं छन्दो ज्योतिषम् इति ॥
अथ परा—यया तद्-अक्षरम् अधिगम्यते । यत् तद् अद्रेश्यम् अग्राह्यम् अगोत्रम् अवर्णम्, अचक्षुःश्रोत्रं तद्-अपाणिपादम् । नित्यं विभुं सर्व्वगतं सुसूक्ष्मं, तद्-अव्ययं यद् भूतयोनिं परिपश्यन्ति धीराः । यथोर्णनाभिः सृजते गृह्णते च, यथा पृथिव्याम् ओषधयः संभवन्ति । यथा सतः पुरुषात् केशलोमानि, तथाऽक्षरात् संभवतीह विश्वम् ॥

मण्डूकोपनिषद्, १ । १ । ४ ७ ॥

5. Two sciences should be known—this is what was said by those who knew the Revelations :—the Ultimate and the Non-Ultimate.

Of these, the Non-Ultimate consists of the *four* Vedas, namely, the Rik, the Yajus, the Sáman and the Atharvan, and *of the six Angas, namely*, the Sikshá *or the science of proper articulation and pronunciation = Othography and Orthoepy*, the Kalpa *or the regulation of the manner of performing sacrifices*, Vyákarana *or grammar*, the Nirukta *or thesaurus, with explanation of the etymology of words*, the Chhandas *or prosody* and the Jyotisha *or astronomy*.

And the Ultimate is the science *embodied in the Upanishads* by which is known the Imperishable, *i.e.*, that which is imperceptible *to the organs of sense* intangible *by the organs of action*, not sprung from any parent, destitute of any quality *or colour*, having neither eyes nor ears, which has no hands nor feet, which is eternal, omnipresent, all-pervading, extremely subtile, undecaying *and* cause of all beings,—that which the wise perceive everywhere: as the spider spreads out and draws in *the thread*, as the annuals grow up in the earth, and as the hairs long and short *grow* from *the body of* a living person, so every thing here comes into being from the Imperishable.—Mundaka-Upanishad, i, i, 4-7.

६। चोदनालक्षणः अर्थः धर्म्मः । २ ॥

तस्य निमित्त-परीष्टिः । ३ ॥

सत्संप्रयोगे पुरुषस्य इन्द्रियाणां बुद्धिजन्म, तत् प्रत्यक्षम्, अनिमित्तं, विद्यमानोपलम्भनत्वात् । ४ ॥

औत्पत्तिकस्तु शब्दस्य अर्थेन सम्बन्धः, तस्य ज्ञानम् उपदेशः, अव्यतिरेकश्च, अर्थे अनुपलब्धे तत् प्रमाणं, बादरायणस्य, अनपेक्षत्वात् ॥५॥

जैमिनिः १ । १ । २-५ ॥

6. Dharma is a *means of securing a desirable* purpose *or end i.e., happiness uncontaminated with pain* of which the Vedic injunction *or precept* is the *only* proof *or source of knowlegde*.—2.

An examination *or establishment by reasoning* of the means *of knowledge* of Dharma, *is made in the following aphorisms, that is to say, the proposition that the Vedic precept is the only means of knowing Dharma is established by reasoning in the next two aphorisms*.—3.

The intellection *or knowledge* that arises on the requisite perfect union of a person's senses with existing objects is *called* perception; that *i.e., perception* is not the means *of knowing Dharma*, by reason of *its* causing knowledge of existing things *only, and therefore Dharma which is not in existence at the time of knowledge derived from Vedic precepts, cannot be proved by, or known from, perception; hence, Dharma is also beyond the scope of Inference founded, as it is, on the Perception of existing facts*.—4.

But the connection of a word with *its* meaning is eternal *or natural not artificial, i.e., not made by man*; the instruction *or precept by the Vedic words* is the *only* means of knowledge of that, *i.e., Dharma*, and is not *otherwise proved* erroneous; *hence* as regards the meaning *conveyed by the Vedic instruction* which is not known *by means of any other proof save that of the words*, the same *i.e., the instruction* is proof *or the only means of knowing the truth of what is conveyed by the words*, because it is not dependent *on any other proof, i.e., the intellection caused by the hearing or perusal of the Vedic words is self-evident*,

that is to say, it does not require any other proof to establish its existence: —This is the opinion of Vyása also."—5.—Jaimini, 1, 1, 2—5.

७। मन्वत्रिविष्णुहारीतयाज्ञवल्क्योशनोऽङ्गिराः।
यमापस्तम्बसम्वर्त्ताः कात्यायनवृहस्पती॥
पराशर-व्यास शङ्ख-लिखिता दक्षगौतमौ।
शातातपो वशिष्ठश्च धर्म्मशास्त्रप्रयोजकाः॥

याज्ञवल्क्यः—१।४-५।

नेयं परिसंख्या किन्तु प्रदर्शनार्थं, अतो बौधायनादेरपि धर्म्मशास्त्रत्वम् अविरुद्धम्। इति मिताक्षरा।

7. Manu, Atri, Vishnu, Hárita, Yájnavalkya, Usanás, Angiras, Yama, A'pastamba, Sambarta, Kátyáyana, Vrihaspati, Parásara, Vyása, Sankha, Likhita, Daksha, Gautama, Sátátapa and Vasishtha, are the compilers of the Dharma-sástras *or Codes of Law.*—Yájnavalkya, i, 4-5.

The Mitákshará on this passage says:—This is not an exhaustive enumeration, but illustrative; hence, the compilations of Baudháyana *Nárada, Devala* and others being Dharma-sástras, is not contrary to it.

८। धर्म्मस्य शब्दमूलत्वाद् अशब्दम् अनपेक्ष्यं स्यात्॥ १॥
अपि वा कर्तृसामान्यात् प्रमाणम् अनुमानं स्यात्। २॥
विरोधे त्वनपेक्ष्यं स्यात् असति ह्यनुमानं। ३॥
हेतुदर्शनाच्च च। ४॥ जैमिनिः, १। ३। १-४॥

8. *It may be contended that* as the words of Revelation form the foundation of Law, therefore that *such as the Smriti* which is not embodied in such words should not be regarded as authority.—1.

But *the answer is,* the Smritis being compiled by the sages who were also the repositories of the Revelation *from whom it was handed down by tradition until recorded in writing,* there arises an inference that the Smritis are founded on the Sruti or Revelation, and therefore *they should be regarded as* authority.—2.

But if there be conflict *of any precept of the Smriti with one of the Sruti;* the Smriti must be disregarded *as spurious;* since the inference arises, *only* when there is no such conflict.—3.

A Smriti must be disregarded as spurious, also, when there is found a reason *for fabricating it, such as the covetousness of priests, or the like.* —4.—Jaimini's Purva-Mimánsá, i, 3, 1-4.

The argument in the second of the above aphorisms is explained in the following sloka cited and commented on by Pártha-Sárathi in his Shástra-Dípiká,—

वैदिकैः स्मर्य्यमाणत्वात् तत्परिग्रहदार्ढ्यतः ।

संभाव्यवेदमूलत्वात् स्मृतीनां वेदमूलता ॥

Revelation is *inferred to be* the source of the Smritis, because they are remembered *and compiled* by those who admit the Veda alone *and nothing else* to be the source of law, and because they have been adopted and acted upon as authoritative by such persons, and because their being founded on the Veda is probable.

९ । सरस्वती-दृषद्वत्योर्देवनद्यो-र्यद् अन्तरम् ।
तं देवनिर्म्मितं देशं ब्रह्मावर्त्तं प्रचक्षते ॥
तस्मिन् देशे य आचारः पारम्पर्य्य-क्रमागतः ॥
वर्णानां सान्तरालानां स सदाचार उच्यते ॥

मनुः—२ । १७-१८ ॥

9. The holy country lying between the holy rivers Sarasvatí and Drishadvatí is called Brahmávarta: the custom in that country, which has come down by immemorial tradition and obtains among the castes pure and mixed, is called approved usage.—Manu, ii, 17-18.

१० । कुरुक्षेत्रञ्च मत्स्याश्च पञ्चालाः शूरसेनकाः ।
एष ब्रह्मर्षिदेशो वै ब्रह्मावर्त्तादनन्तरः ॥
एतद्देशप्रसूतस्य सकाशादग्रजन्मनः ।
स्वं स्वं चरित्रं शिक्षेरन् पृथिव्यां सर्व्वमानवाः ॥
हिमवद्-विन्ध्ययोर्मध्यं यत् प्राग्विनशनादपि ।
प्रत्यगेव प्रयागाच्च मध्यदेशः प्रकीर्त्तितः ॥
आसमुद्रात्तु वै पूर्व्वात्, आसमुद्रात्तु पश्चिमात् ।
तयोरेवान्तरं गिर्य्योर्-आर्य्यावर्त्तं विदुर्बुधाः ॥
कृष्णसारस्तु चरति मृगो यत्र स्वभावतः ।
स ज्ञेयो यज्ञियो देशो म्लेच्छदेशस्ततः परः ॥
एतान् द्विजातयो देशान् संश्रयेरन् प्रयत्नतः ।
शूद्रस्तु यस्मिन् कस्मिन् वा निवसेद् वृत्तिकर्षितः ॥

मनुः, २ । १९-२४ ॥

10. Next *in holiness or position* to Brahmávarta is the country called Brahmarshi consisting of Kurukshetra, Matsyá Panchálá and Súrasená. From a Bráhmana born in this country all men on earth should learn their respective usages. The country lying between the Himavat and the Vindhya *mountains* and to the east of Vinasana *the place where the Sarasvatí disappears* and to the west of Prayága *i.e., Allahabad* is called Madhya-desa *or the middle country*. The country *extending* to the eastern, and to the western oceans and *lying* between these very mountains the wise call Aryávarta. Where the black antelope lives naturally, that is known as the sacrificial country; beyond the same is the country of the Mlechchhas. These countries, the twice-born persons should take care to dwell in *if born elsewhere*; but a Súdra may live anywhere, for the sake of maintenance.—Manu, ii, 19-24.

११ । दक्षिणेन हिमवतः उत्तरेण विन्ध्यस्य ये धर्म्माः, ये चाचाराः, ते सर्वे प्रत्येतव्याः, न त्वन्ये प्रतिलोमकल्पधर्माः । एतद्-आर्य्यावर्त्तम् इत्याचक्षते । गङ्गायमुनयोरन्तराप्येके, यावद् वा कृष्णमृगो विचरति तावद् ब्रह्मवर्च्चसमिति ॥ वशिष्ठः । प्रथमाध्याये ॥

11. "Those laws and those usages that are *observed in the country* on the south of the Himavat and on the north of the Vindhya, all those ought to be followed: but not the laws prevailing among the Mlechchhas, that are different *from these*. This country *between Himavat and Vindhya* is called A'ryávarta; some say *this country is limited to that which lies* between the Ganges and the Yamuná, or *extends* so far as the black antelope roams, where spiritual pre-eminence *obtains*.—Vasishtha, Ch. 1.

१२ । यस्मिन् देशे य आचारो व्यवहारः कुलस्थितिः ।
तथैव परिपाल्योऽसौ यदा वशम् उपागतः ॥

याज्ञवल्क्यः—१ । ३४३ ॥

12. Whatever customs, practices and family usages prevail in a country, shall be preserved intact, when it comes under subjection by (conquest).—Yájnavalkya, i, 343.

१३ । यस्मिन् देशे य आचारो न्यायदृष्टस्तु कल्पितः ।
स तस्मिन्नेव कर्त्तव्यो न तु देशान्तरे स्थितः ॥
यस्मिन् देशे पुरे ग्रामे त्रैविद्ये नगरेऽपि वा ।
यो यत्र विहितो धर्म्म-स्तं धर्मं न विचालयेत् ॥

देवलः पराशरमाधव-धृतः ॥

13. But if any usage required by utility is established in a locality *contrary to the written texts of law,* it should be practised therein only, but not in any other district. Whatever customary law is prevalent in a district, in a city, in a town, or in a village, or among the learned, the said law *though contrary to the Smritis* must not be disturbed.—Devala, cited in the Parásara-Mádhava.

१४ । सर्व्वेषाम् एवमादीनां प्रतिदेशं व्यवस्थया ।
आपस्तम्बेन संहृत्य दुष्टादुष्टत्वम् आश्रितं ।
येषां परम्पराप्राप्ताः पूर्व्वजैरप्यनुष्ठिताः ।
त एव तैर्न दुष्येयु-राचारैर्नेतरे पुनः ॥

कुमारिलस्वामिनेदं परमतमित्युपन्यस्तं तन्त्रवार्त्तिके प्रथमाध्याये तृतीयपादे ॥

14. A'pastamba has briefly explained the reprehensibility or non-reprehensibility of all such usages *as are contrary to the written texts of law* by referring them to different localities. By these usages they do not become liable to censure, who have got them by tradition, and whose predecessors used to practise them; others, however, are not so, *but become guilty of violating the written texts of law, if they practise those usages.*

This is stated as the opinion of others, by Kumárila Swámin who himself maintains the invalidity of such usages, in his Tantra-Vártika, first Chapter, third Páda or Section.

१५ । अष्टादशपुराणानि पुराणज्ञाः प्रचक्षते ।
ब्राह्मं पाद्मं वैष्णवञ्च शैवं भागवतं तथा ॥
अथान्यं नारदीयञ्च मार्कण्डेयञ्च सप्तमम् ।
आग्नेयम् अष्टमञ्चैव भविष्यं नवमं तथा ॥
दशमं ब्रह्मवैवर्त्तं लैङ्गम् एकादशं स्मृतम् ।
वाराहं द्वादशञ्चैव स्कान्दञ्चात्र त्रयोदशम् ॥
चतुर्दशं वामनञ्च कौर्म्मं पञ्चदशं स्मृतम् ।
मात्स्यञ्च गारुड़ञ्चैव ब्रह्माण्डञ्च ततः परम् ॥
सर्गश्च प्रतिसर्गश्च वंशो मन्वन्तराणि च ।
सर्व्वेष्वेतेषु कथ्यन्ते वंशानुचरितञ्च यत् ॥

विष्णुपुराणं, ३।६।२१-२५ ॥

15. Eighteen *Puránas* are enumerated by those versed in the *Puránas*:—the Bráhma, the Pádma, and the Vaishnava, the Saiva, Bhága-

vata. likewise, another is the Náradíya, and the Márkandeya is the seventh, and the A'gneya is the eighth, likewise the Bhavishya is the ninth, the tenth is the Brahma-vaivarta, the Lainga is ordained the eleventh, and the Váráha is the twelfth, and the Skánda is the thirteenth, in this *enumeration* the Vámana is the fourteenth, the Kaurma is ordained the fifteenth, posterior to these are the Mátsya, and the Gáruda and the Brahmánda: In all these the subjects dealt with are, the creation, the secondary creation, the dynasties *of gods, sages and kings* the ages of the world, as well as the career of the dynasties.—Vishnu-Purána, iii, vi, 21-25.

१६ । श्रुतेर्द्वैधे स्मृतेर्द्वैधे स्थलभेदः प्रकल्पते ।
श्रुतिस्मृतिविरोधे तु श्रुतिरेव गरीयसी ॥

16. In case there be two contradictory precepts of the Sruti or of the Smriti, they are reconciled thus,—different cases are to be assumed *to which they are respectively applicable*: but if there be a conflict between *a text of* the Sruti and *one of* the Smriti, the Sruti alone must prevail.

१७ । स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।
अर्थशास्त्रात् तु बलवत् धर्म्मशास्त्रम् इति स्थितिः ॥

याज्ञवल्क्यः—२ । २१ ॥

17. But in a case of conflict between two passages of the Smriti, reconciliation based on usage must prevail: but the rule is, that the sacred books on law are more weighty than sacred books on politics.—Yájnavalkya, ii, 21.

१८ । श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।
तत्र श्रौतं प्रमाणन्तु तयोर्द्वैधे स्मृतिर्वरा ॥

व्याससंहिता ॥

18. When there is a conflict between the Sruti, the Smriti and the Purána, the Sruti must prevail: but in a conflict between the latter two, the Smriti must prevail.—The Code of Vyása.

१९ । कायेन मनसा वाचा यत्नाद् धर्म्मं समाचरेत् ।
अस्वर्ग्यं लोकविद्विष्टं धर्म्मम् अप्याचरेन् न तु ॥

याज्ञवल्क्यः—१ । १५६ ॥

19. Practise with care what is lawful, by body, mind and speech; but practise not that which is abhorred by the world, though it is ordained in the Sacred Books; for, it secures not spiritual bliss.—Yájnavalkya, i, 156.

२० । अस्वर्ग्यं लोकविद्विष्टं धर्म्मम् अप्याचरेन् न तु ॥
समुद्र-यात्रा-स्वीकारः कमण्डलु-विधारणम् ।
द्विजानाम् असवर्णासु कन्यासूपयमस्तथा ॥
देवरेण सुतोत्पत्तिर्मधुपर्के पशोर्वधः ।
मांसदानं तथा श्राद्धे वानप्रस्थाश्रमस्तथा ॥
दत्ताक्षतायाः कन्यायाः पुनर्दानं परस्य च ।
दीर्घकालं ब्रह्मचर्य्यं नरमेधाश्वमेधकौ ॥
महाप्रस्थानगमनं गोमेधश्च तथा मखम् ।
इमान् धर्म्मान् कलियुगे वर्ज्यान् आहुर्मनीषिणः ॥

बृहन्नारदीयम्—२२ । १२-१६ ॥

20. But practise not what is abhorred by the people, though it is ordained in the sacred books; for, it secures not spiritual bliss. Taking sea-voyage; carrying a waterpot *by students;* likewise marriage by regenerate men, of damsels not belonging to the same tribe; procreation of son *on a woman* by her husband's younger brother; slaughter of cattle for entertaining honoured guests; offering of flesh meat in ancestor-worship; retirement to a forest *or adoption of the third order of life;* gift over again of a daughter once given in marriage though still a virgin to another *bridegroom;* study of the Vedas for a long time; man-sacrifice; horse-sacrifice; ceaseless walking with intent to die; and likewise cow-sacrifice;—these practices though permitted by the sacred books, the wise declare avoidable in the Kali age.—Vrihan-Náradíya-Purána, xxii, 12-16.

२१ । दत्तौरसेतरेषान्तु पुत्रत्वेन परिग्रहः ।
शूद्रेषु दास-गोपाल-कुलमित्रार्द्धसीरिणां ।
भोज्यान्नता, गृहस्थस्य तीर्थसेवातिदूरतः ।
ब्राह्मणादिषु शूद्रस्य पक्वतादिक्रियापि च ।
भृग्वग्निमरणञ्चैव वृद्धादिमरणं तथा ।
इमानि लोकगुप्त्यर्थं कलेरादौ महात्मभिः ।
निवर्त्तितानि कर्म्माणि व्यवस्थापूर्व्वकं बुधैः ।
समयश्चापि साधूनां प्रमाणं वेदवद्-भवेत् ॥

आदित्यपुराणवचनम् ॥

21. Recognition of sons other than the Aúrasa and the Dattaka; participation *by a Bráhmana* of food from the following descriptions of Súdras, namely, *his* slave, *his* cowherd, *his* family-friend, and the cultivator *of his land* delivering half the produce; pilgrimage by a householder to a very distant holy place; participation by the Bráhmanas and the like, of food prepared by a Súdra; suicide by falling from a precipice or by cremation; likewise suicide by a person extremely old or the like:—In the beginning of the Kali age, these practices have been prohibited after consideration by the learned for the protection of the people: for, a convention also, made by the virtuous, has as much authority as the Veda.—A'ditya Purána quoted by Raghunandana.

२२ । तत्रासीनः स्थितो वापि पाणिम् उद्यम्य दक्षिणम् ।
विनीतवेषाभरणः पश्येत् कार्य्याणि कार्य्यिणाम् ॥ २ ।
प्रत्यहं देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः ।
अष्टादशसु मार्गेषु निबद्धानि पृथक् पृथक् ॥ ३ ।
तेषाम् आद्यम् ऋणादानं, निक्षेपो-ऽस्वामिविक्रयः ।
सम्भूय च समुत्थानं दत्तस्यानपकर्म्म च ॥ ४ ।
वेतनस्यैव चादानं संविदश्च व्यतिक्रमः ।
क्रयविक्रयानुशयो विवादः स्वामि-पालयोः ॥ ५ ।
सीमाविवादधर्म्मश्च पारुष्ये दण्डवाचिके ।
स्तेयश्च साहसञ्चैव स्त्रीसंग्रहणमेव च ॥ ६ ।
स्त्रीपुंधर्म्मो विभागश्च द्यूतम् आह्वय एव च ।
पदान्यष्टादशैतानि व्यवहारस्थिताविह ॥ ७ ॥

मनुः ८ । २-७ ॥

22. In his Court of Justice, either sitting or standing, holding forth his right arm, unostentatious in his dress and ornaments, let the king, every day, decide, one after another, causes of suitors, separately classified under eighteen Forms of Action, by rules founded on Local Usages and Codes of Law. Of these *Forms of Action* the first is the Recovery of Debts, *the others are*,—(2) Deposit and Pledge, (3) Sale without Ownership, (4) Joint Concerns *or Partnership*, (5) Resumption of Gifts, (6) Non-payment of Wages, (7) Breach of Contract, (8) Rescission of Sale and Purchase, (9) Dispute between the Owner *of cattle* and the Shepherd, (10) Dispute relating to Boundaries *or Tresspass*, (11) Violence consisting of Assault, (12) and *Violence* consisting of Abuse *or Slander and Defamation*, (13) Theft, (14) Force *consisting of robbery, hurt or violence on women*, (15) Adultery, (16) Duties of Man and Wife, (17) Partition *and*

Inheritance, and (18) Gambling and Betting:—these are in this world the eighteen foundations upon which litigation rests.—Manu, viii, 2-7.

Nárada has added another form of Action called प्रकीर्णकम् or Miscellaneous, which includes various matters that cannot come under those declared by Manu, and in which the Action arises at the instance of the king. The first and the last lines of Nárada's description of it are as follows:—

२३। प्रकीर्णके पुनर्ज्ञेयो व्यवहारो नृपाश्रयः।
न दृष्टं यच्च पूर्व्वेषु सर्वं तत् स्यात् प्रकीर्णके॥

23. In the Miscellaneous Form of Action, the litigation depends upon the king. Whatever is not considered in the foregoing *Forms of Action*, all that would come within the Miscellaneous Form of Action.

२४। स्मृत्याचार-व्यपेतेन मार्गेणाधर्षितः परैः।
आवेदयति चेद् राज्ञे व्यवहारपदं हि तत्॥

याज्ञवल्क्यः—२, ५॥

24. If a person wronged by others in a way contrary to the Smriti or Custom complains to the king, then arises a Cause of Action.—Yájnavalkya, ii, 5.

ORIGIN AND SOURCES OF LAW, SCHOOLS, &c.

ओम् नमो भगवते वासुदेवाय।

Divine origin of laws.—The Hindus believe their law to be of divine origin, and they believe this not only of what Austin calls the laws of God, but positive law also is believed by them to have emanated from the Deity. The idea of Sovereign in the modern juridical sense was unknown to them. They had kings, but their function was defined by the divine law contained in the Smritis, and they were bound to obey the selfsame law, equally with their subjects. By this original theory of its origin, the law was independent of the state, or rather the state was dependent on law, as the king was to be guided in all matters connected with Government, by the revealed law, though he was not excluded from a control over the administration of justice. The king being theoretically the administrator of justice his decrees must have been recognized as binding on suitors from the very earliest times. And this gradually introduced the view recognized by commentators that

royal edicts in certain matters have as much binding force as divine law, should the former be not repugnant to the latter.

The earlier notion of law was gradually modified to a certain extent, as may be gleaned from the remarks of the commentators. And the conception of positive as distinguished from divine law, presented to us by the commentators, nearly approaches the ideas of modern jurisprudence.

The sources of law.—The term source of law is used in two senses: in one, the Deity according to the Hindus, and the Sovereign according to modern jurisprudence, is the fountain source of law; and in the other sense, the term means that to which you must resort to get at law, in other words, the evidence or records of law, which you are to study for the purpose of learning law. In this sense, the sources of Hindu law are the Sruti, the Smriti, and the Immemorial and *approved* Customs, by which the divine will or law is evidenced.

Sruti.—The Sruti is believed to contain the very words of the deity. The name is derived from the root *sru* to hear, and signifies what was *heard*.

The Sruti contains very little of lawyer's law: they consist of hymns, and deal with religious rites, true knowledge and liberation. There are, no doubt, a few passages containing an incidental allusion to a rule of law, or giving an instance from which a rule of law may be inferred. The Sruti comprises the four Vedas, the six Vedángas, and the Upanishads: Text No. 5. The Upanishads embody the highest principles of Hindu religion, referring to which Schopenhauer says,—"In the whole world there is no study so beneficial and so elevating as that of the Upanishads. It has been the solace of my life, it will be the solace of my death."

Smriti.—The Smriti means what was *remembered*, and is believed to contain the precepts of God, but not in the language they had been delivered. The language is of human origin, but the rules are divine. The authors do not arrogate to themselves the position of legislators, but profess to compile the traditions handed down to them by those to whom the divine commands had been communicated.

The Smritis are the principal sources of lawyer's law, but they also contain matters other than positive law. The complete Codes of Manu and Yájnavalkya deal with religious rites, *positive law*, penance, true knowledge and liberation. There are some that deal with positive law alone, such as the Code of Nárada, now extant. Many others contain nothing of civil law. The Smritis as a whole deal with man as a being of

infinite existence, whose present life is like a point in a straight line infinite in both directions.

It should be noticed that writers on the Mímánsá system of Hindu Philosophy discuss the question,—Why should Smritis composed by human beings be taken as evidence of *Dharma* or Law, of which Revelation is admitted by all to be the only source? They maintain that the Smritis must be *inferred* to be founded on lost or forgotten Sruti, inasmuch as they are compiled from memory, and are declared as embodying binding rules of conduct, by the sages who were perfectly familiar with the Vedas, and who admitted the Sruti alone and nothing else, to be the foundation or evidence of Law; and as they have all along been adopted and followed in practice by the sages, as well as by other persons learned in the Vedas and entertaining the same view with respect to the origin and source of Law. They also notice an objection that may be raised to this, namely,—Why then have not, the very words of the original revelations that are supposed to be the foundation of the Smritis, been preserved? And they refute it by saying that human memory being frail, there is no wonder that precepts should be remembered while the exact words in which they had originally been expressed might be forgotten. There is a great distinction between the sacred literature dealing with rules regulating the conduct of men in this world as members of society, and that relating to purely religious matters; the precepts of the former are observed in practice, while the latter is rather theoretical in character, the wording of which was therefore of greater importance than that of the former. The rise of different Sákhás or schools of Vedic literature affords evidence of the loss of the exact wording of portions of the latter kind of Revelation, since parts of the Vedas, found in one Sákhá are wanting in others, showing that when the Vedic literature used to be handed down by tradition, parts were omitted by different Sákhás with a view to lighten the burden on the memory of students: and the practice with the teacher of a particular Sákhá, who was familiar with the other Sákhás also, was not to teach to a pupil of his own Sákhá, the exact wording of those portions of other Sákhás, that were wanting in his own, but to give their purport in his own language, so that the same might not be mistaken as part of his own Sákhá.

It is worthy of notice that the inference set forth above forms the foundation of the authority of the Smritis.

When this inference cannot properly be made with respect to a particular precept of Smriti, then the same must be disregarded as spurious. Thus, if a Smriti is in conflict with Sruti, it must be rejected as being not founded on Revelation. Similarly, a passage of Smriti, the origin of which may reasonably be attributed to the covetousness of priests, or to the selfishness or the like improper motive of some persons who might introduce any interpolation in it, connot be regarded as authoritative, but should be discarded as a fabrication and interpolation :—See Texts, No. 8.

Dharma, Law & Sources.—The word *dharma* is generally rendered into Law and includes all kinds of rules religious, moral, legal, physical, metaphysical or scientific, in the same way as the term Law does, in its widest sense. The word is derived from the root *dhri* to hold, support or maintain, and it means law, or duty, or the essential quality of persons or things. By the term *dharma* is understood the rules whereby not only mankind but all beings are governed ; it also imports duty or distinctive feature of beings implying subjection to, or control by, the rules. The term *Shástra* is derived from the root *Shás* to teach, enjoin or control, and means teacher. The Sruti and the Smriti are comprehended by the term *Dharma-shástra* in its primary sense, inasmuch as the objects of both are to teach of rules or duties. But the word *Dharma-shástra* is often used to designate the Smritis alone, with a view to mark their practical importance : thus Manu says,—

श्रुतिस्तु वेदो विज्ञेयो धर्मशास्त्रन्तु वै स्मृतिः ।

which means,—"By Sruti is known the Veda, and by Smriti the *Dharma-Shástra*."

The Vedas are rather theoretical than practical : of the Vedas, the Rik consists of hymns in praise of Gods and things ; the Sáman consists of hymns intended to be sung ; the Yajus describes sacrifices and their ceremonial ; and the Atharvan is disapproved as it prescribes ceremonies that may be performed for causing injury to an enemy or the like ; the Upanishads deal with theology and the means, implying esoteric Hinduism, whereby a person may attain *moksha* or liberation of the soul from the necessity of repeated births and deaths, and its restoration to its original state of (सच्चिदानन्दः or) Existence, Knowledge and Beatitude—the *Summum Bonum* of the Hindus. While the Smriti lays down rules relating to sacramental and other religious rites, and positive law, and pollution, penance and theology.

intended to be practically observed by men in the course of their lives; and in doing so, it embodies, in modern Sanskrit, many of the rules of the Sruti; and accordingly the term Dharma-Shástra is applied to it with a view to thrust into prominence its importance in a practical point of view.

Dharma is defined by Jaimini the founder of the School of Hindu philosophy, called *Púrva* (prior) *Mimánsá*, to be the means of attaining the desirable ends of man, knowable from the Vedic precepts alone: (Text No. 6). The ends of man or पुरुषार्थाः are, four, namely,—धर्मार्थकाममोक्षाः or Religious merit securing heavenly happiness after death, Wealth, Desirable objects other than these, and *Moksha* or liberation from metempsychosis or Restoration of the soul to its own real state of (सच्चिदानन्दः or) Existence, Knowledge and Beatitude, the realization of which is prevented by Máyá or illusion. It should be noticed that the term "Desirable objects" includes the other three of the group of four; but they are separately mentioned to indicate the importance attached to them by different persons.

The term *Dharma*, therefore, includes not only what are conveyed by the term Law in its widest sense, but also persons and things that may be the means of attaining any of the desirable ends. And positive law which is conducive to the welfare and well-being of people, is comprehended by the term "Desirable objects."

In the English translation of the original texts, the word Law is generally used as equivalent to *Dharma*, leaving out of consideration any thing else comprised by it according to Jaimini. And that appears to be the sense in which the word is generally used.

It is in this wide sense, that the sources of *dharma* or law are (1) the Sruti, (2) the Smriti, and (3) the Immemorial Customs. The first though of the highest authority is of very little importance to lawyers. The last again are of very great importance, as being the rules by which the people are actually guided in practice, and their value has come to be specially recognized under the British rule, and authorized records of customs of various localities have been compiled. They override the Smritis and their accepted interpretation given by an authoritative commentator, should these be inconsistent with them. They prove that the written texts of law are either speculative and never followed in practice, or obsolete. The Hindu commentators have not, except in a few instances, devoted much attention to these unrecorded customs and usages,

though they recognize their authority as a source of law. They have confined their attention to the Smritis alone, which constitute the primary *written* sources of law. The customary law will be discussed later on.

The exact number of the Smritis cannot be stated, many of them are not extant, being either lost or unprocurable. From the quotations in the various commentaries you may make a list of the Codes. Most of them are written in metre, and a few in both prose and metre. They do not appear to have been written at the same time, nor do they lay down the selfsame law; and a process of development may be perceived in them. Thus there is conflict of law as laid down in the different Codes on various matters.

Conflict of law and commentaries.—Conflict of law, however, is opposed to the theory of its divine origin, from which perfect harmony between the different Codes must necessarily be expected. The conflict between the Smritis, seeming or real, has given rise to the commentaries or digests that are called Nibandhas. Conflict between the Shástras, however, is admitted and the mode of reconciling them is pointed out thus:—"When there is a conflict between two texts of the Sruti or of the Smriti, they are to be presumed to relate to different cases; but where a text of the Sruti is opposed to one of the Smriti, the former must prevail." (Texts Nos. 16—18.)

Scope of Shastras.—This admission of the existence of conflict of law, opposed to the theory of its origin, has landed the commentators upon a difficulty, which they attempt to get over in the following way:—The proper object of the Shástras, say they, is to teach of things that lie beyond the scope of human reason; what men would do or refrain from doing of their own accord from purely human motives, need not be laid down in the Shástras; accordingly they classify the precepts laid down in the Shástras thus:—where a precept forbids men to do what they may do under the natural impulses, it is called a *Nishedha* or prohibition: but where a precept enjoins men to do a certain thing, when no reason could be suggested for doing it, it is called an *Utpatti-vidhi* or an injunction creating a duty: and a precept regarding what men may do, of their own accord, may come within the purview of the Shástras, if it enjoins that act at a particular time or place; such a precept is called a *Niyama-vidhi* or restrictive injunction. there is a third kind of *vidhi* or injunction called *Parisankhyá* which is an injunction in form, but a prohibition in purport, as for instance,—

"Man shall eat the flesh of the five five-clawed animals,"—which means, that man shall not eat the flesh of five-clawed animals excepting that of the five specified ones : but precepts that do not fall under any one of the above descriptions are called *Anuváda*, superfluous rules that need not have been laid down in the Shástras.

Positive law and Shastras.—The commentators do, either expressly or by necessary implication, hold that the Shástras in so far as they deal with positive law, are generally *Anuváda* or superfluous, inasmuch as the rules of positive law are deducible from reason, in other words, from a consideration of what best conduces to the welfare of the society and suits the feelings of the people. This is proved by the systems of law obtaining among non-Hindu peoples who are utterly ignorant of the Shástras. They do, in fact, draw a distinction between positive law on the one hand, and the rules of religious or moral obligation on the other.

Thus the author of the Mitákshará (1, 3, 4,) cites and follows a text which runs thus :—"Practice not that which is legal, but is abhorred by the world, for it secures not spiritual bliss." This text does virtually suggest the maxim *Vox populi est vox Dei* and maintain that popular feelings override an express text of law contained in the Shástras, taking of course, the term law in the limited sense of lawyers.

Factum valet.—On the very same principle does rest the so called doctrine of *factum valet quod fieri non debuit*, usually though not correctly, thought to be peculiar to the Bengal School, and enunciated for the first time by the author of the Dáyabhága, the founder of that school. For, it has been held, and if I may presume to say so, correctly held by the Privy Council in the case of *Wooma Deyi*, I. L. R., 3 Cal., 587, that the doctrine is recognized by the Mitákshará School also. There appear to be considerable misconception and difference of opinion as to what was intended to be laid down by the author of the Dáyabhága in the passage—वचनशतेनापि वस्तुनोऽन्यथाकरणाशक्तेः:—which means, "A thing (or the nature of a thing) cannot be altered by a hundred texts." The rule intended to be laid down may be thus formulated,—An act or transaction done by a man in the exercise of a right or power, natural or recognized by law, cannot be undone or invalidated by reason of there being texts in the Shástras prohibiting such act or transaction.

The above passage of the Dáyabhága, was rendered by

Colebrooke into,—"For a *fact* cannot be altered by a hundred texts." The founder of the Bengal School holds that an alienation by a father or a co-heir, of his self-acquired immovable property, or of his undivided share in joint family property, respectively, is perfectly valid, even when made without the consent of his sons in the one case, or of his co-sharers in the other, notwithstanding texts of law requiring such consent. And in support of this position he sets forth the above reason. His argument is this :—Ownership consists in the power of dealing with property according to pleasure ; it cannot but be admitted that the father and the co-heir have ownership, respectively, in the self-acquired immovable and in the undivided share, and consequently power of alienation : hence, the *nature of the thing* ownership, or its incidents such as sale or other alienation, cannot be affected by a hundred texts prohibiting alienation without consent ; such texts therefore, are to be taken as admonitory but not imperative. Of the same effect are texts prohibiting gift or other alienation of the whole of his property by a man having wife and children to support. Parallel to them are passages forbidding the gift in adoption, of an only son by a person in the exercise of *patria potestas* or parental property in a child. This is one of the many principles upon which commentators differentiate between rules of legal and religious or moral obligation, which are blended together in the Codes of Hindu Law.

There is no real difference between the two schools, as regards the tests for distinguishing the rules of legal obligation from those that are merely preceptive. The Mitákshará rule that a co-heir cannot alienate his undivided coparcenary interest in joint property without the consent of his coparceners, is a necessary logical consequence of the doctrine that co-heirs are *joint tenants*, and not *tenants in common* as in the Bengal School. Hence the distinction in this respect does not support the opinion that the doctrine of *factum valet* is not recognized by the Mitákshará School to the same extent as in Bengal.

The following observations of the Lords of the Judicial Committee on this maxim are instructive and should be carefully read :—"Their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet*. That unhappily expressed maxim clearly causes trouble in Indian courts. Sir M. Westropp is quite right in pointing out that if the *factum*, external

act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law." *Sri Balusu* v. *Sri Balusu*, I. L. R., 22 M., 423 = 26 I. A., 113, 144.

Practices to be eschewed in Kali age.—So also Raghunandana in his treatise on marriage (Udváha-Tattva) prohibits, contrary to the Smritis and the earlier commentaries, the intermarriage between different tribes, and in support of this position cites a passage from the A'ditya-Purána, which after laying down that certain practices including intermarriage, though authorized by the Sástras, are not to be followed in this Kali age, concludes thus—"In the beginning of the Kali age these practices have been prohibited after consideration by the learned for the protection of the people: *and a convention come to by the virtuous has as much legal force as a text of the Veda.*" (Text No. 19).

Thus we see that the rules of the Sástras in so far as they relate to secular as distinguished from purely spiritual matters, are not inflexible, but may be modified or replaced if repugnant to popular feelings, or if in the opinion of the learned the exigencies of Hindu society require a change. The Sástras therefore, do not present any insurmountable difficulty in the way of social progress, and Hindus may re-constitute their society in any way they like without renouncing their religion.

Whether these practices (Text No. 19) have become illegal by reason of the said prohibition, is a question which has not as yet been considered by our courts. In one case the affirmative was assumed, and an intermarriage was pronounced invalid: *Melaram* v. *Thanooram*, 9 W. R., 552.

Pura'nas.—The above quotation from the A'ditya-Purána shows that the Puránas also are considered by the later commentators as a source of law. Jurisprudence, however, does not come within the scope of the subjects that are, according to the Puránas themselves, dealt with in them: (Text No. 12). They are voluminous mythological poems professing to give an account of the creation, to narrate the genealogy of gods, of ancient dynasties and of sacerdotal

families, to describe the different ages of the world, and to delineate stories of Gods, ancient kings and sages; and in doing so they also relate religious rites and duties. These works are said to have been composed by the celebrated Veda-Vyása or compiler of the four Vedas, and are enumerated in some of the Puránas to be eighteen in number. But there are many other works of the same kind, the authorship of which is not attributed to Vyása which appear to have been written subsequently, and which are on that account styled Upa-Puránas, and are respectively deemed supplementary to one or other of the eighteen Puránas. The Puránas are not considered authoritative so as to override the Smritis, but are deemed to illustrate the law by the instances of its application, that are related by them and are looked upon as precedents: (Text No. 18). With respect to their authority in matters of positive law, Professor Wilson rightly observes that "the Puránas are not authorities in law; they may be received in explanation or illustration, but not in proof." It should be observed that the doctrine of prohibition in the Kali age, of certain practices which are authorized by the Smritis, is enunciated by some of the Upa-Puránas, and cannot, therefore, be entertained by our courts, if the Puránas are not authorities in law.

Customs:—Divine will is evidenced also by immemorial customs, indicating rules of conduct; in other words, such customs are presumed to be based on unrecorded revelation. Manu and Yájnavalkya declare सदाचारः *approved* custom or usage to be evidence of law. Some of the other sages use the term शिष्टाचारः meaning *usage of the learned* instead of, and as equivalent to, the said expression सदाचारः meaning *approved usage* or *usage* of the virtuous. By that term are to be understood the traditional usages prevailing in a particular locality, which, according to Manu, is Brahmávarta or the country between the two rivers *Sarasvati* and *Drishadvati*, but which, according to other sages, is extended so as to include according to some the whole of Northern India between the Himálaya and the Vindhya mountains excluding the Punjab and probably the Eastern part of Bengal. Although from the explanation of these terms, as given by some of the sages, they seem to be limited to the usages of those that are virtuous and versed in the sacred literature, yet as the usages prevailing among tradesmen, artizans and the like are maintained by the sages themselves to be binding on them, they are not to be taken as limited or qualified in that manner. The limitations or quali-

fications, however, may be taken to be intended to exclude *immoral* customs.

The subject of *immoral* customs and usages is not free from difficulty. There are certain communities in India, whose existence itself may be attributed to vice and want of morals, as for instance the dancing girls and the women of the town. The Hindu Law recognizes the prostitutes as forming a separate community and existing from immemorial times, and lays down rules relating to disputes between them and their paramours. The existence of such a class is deemed by the Hindus to be conducive to the welfare of their society, and necessary for the preservation of the chastity of women so highly valued and jealously guarded by them. There are usages among these unfortunate women, that appear immoral to us, although they may be conducive to their happiness, for instance the practice of the adoption of daughters. These outcasted women, most of whom have none to call their own, have recourse to adoption to secure a relation who would look after them in old age, although the minor girls so adopted may have to lead vicious lives: thus this practice looked at from their point of view, appears to be unobjectionable; but from the other, it appears *immoral.* There is a conflict of rulings with respect to the recognition by the Courts of Justice, of this usage as well as a few caste-customs such as that authorizing a woman to abandon her husband and re-marry without his consent, and the usage permitting divorce and re-marriage by mutual consent of the husband and wife. See Mayne § 55.

But it should be observed that when the question comes before the courts for their decision, the mischief has already been done; and the refusal to recognise the usage serves no useful purpose, but in most cases involves great hardship by defeating expectations and disturbing settled arrangements of their property, intended by deceased persons to take effect after their death.

Customs and Smritis or Law.—There is a difference of opinion among commentators on the Mímánsá with respect to the evidentiary force of customs and usages; some commentators are of opinion that usages give rise to an inference of being based on unrecorded or forgotten Sruti or Revelation, in the same way as Smritis do. While others maintain that as the learned of modern times cannot be taken to have been so familiar with the Vedas as Manu and other sages were, the usages observed by the learned of comparatively

recent times cannot give rise to an inference of being founded on Sruti, but can only give rise to an inference of being based on some now lost or forgotten *Smriti* with which they may be presumed to have been familiar. Accordingly they hold that usages are inferior to Smritis, and must not be followed when in conflict with them. But agreeably to the former view usages and Smritis are of equal authority as evidence of law; and in case of conflict between them, the former must be taken to be of greater force as being actually observed in practice.

This view appears to accord with reason more than the other, and has been adopted by the highest tribunal which observes,—"Under the Hindu system of law, *clear proof of usage will outweigh the written text of the law.*"*

Custom is explained by the Judicial Committee thus,—"Custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly." *Hurpurshad* v, *Sheo*, 3 I. A., 259, 285.

It must not, however, be supposed that customs are always in derogation of the general rules of law; for, there may not be any rules of the general law on a subject except what are supplied by customs.

According to Hindu law and the decisions of the highest tribunal, the Indian courts are bound to decide cases agreeably to such customs when proved to exist, although they may be at variance with the School of Hindu law, prevalent in the locality. This appears to be a most salutary rule, regard being had to the facts that many precepts in the Sástras are recommendatory in character, and that many innovations have been introduced by Pandits of the Mahomedan period, who were neither judges nor lawyers, in their commentaries on Hindu law.

This resembles the view taken by German jurists, of customary law, and is opposed to that of Austin who maintains that the rules of customary law become positive law *when* they are adopted as such by the courts of justice or promulgated in the statutes of the State. The great jurist seems to have been thinking of the state of things in England, and not in a country like India, where there was no statute law, but where the entire body of laws was based upon immemorial customs and usages.

Definition of custom.—Custom is a rule which in a particular family, or in a particular class of persons, or in a particular locality, has from long usage,—obtained the force of law.

Division of customs.—Customs may be divided under three heads, namely, (1) Local customs, (2) Class customs, and (3) Family customs.

1. Local customs are binding on all the inhabitants of a particular locality which may be the whole country, or a province, or a district, or a town, or even a village.

2. Class customs are customs of a caste, or of a sect, or of the followers of a particular profession or occupation such as agriculture, trade, mechanical art and the like.

3. Family customs are confined to a particular family, such as those governing succession to an impartible Raj. Similar to them are the usages of succession to *maths* or religious foundations.

Essentials of customs.—Antiquity, certainty, reasonableness and continuity are essential to the validity of a custom. On this subject the Lords of the Judicial Committee observe as follows: "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."—*Rama* v. *Siva*, 14 M.I.A., 570, 585.

Time immemorial.—A custom, in order to have the force of law, must be ancient or *immemorial.* It is therefore important to consider what is to be deemed *time immemorial.* In England the expression Time immemorial, or Time out of mind, or Time whereof the memory of man runneth not to the contrary, is considered to denote legally the time commencing from the reign of King Richard the First, *i.e.*, A.D. 1189.

An opinion has been expressed that in this country the time of the Permanent Settlement should be taken as the limit, and it is asserted that there is no rule of Hindu law on the point.

This assertion, however, is not correct. The Hindu lawyers have laid down a reasonable rule on this question. One hundred

years is the limit propounded by them. Whatever is beyond a century is *immemorial* or out of mind of man whose span of life according to the Sruti extends to one hundred years only: accordingly everything previous to it must be beyond human memory and as such *immemorial*. See Mit. on Yájnavalkya, ii, 27.

Family Customs.—The foregoing observations apply both to local and family customs: a family usage also must be ancient and invariable, and being in derogation of ordinary law must be satisfactorily proved:—*Raja Nagendra* v. *Raghunath*, W. R., 1864, 23; *Chandrika* v. *Muna*, 29 I. A., 70.

But a family usage differs from a local custom in this that it may be given up and discontinued, and the discontinuance whether accidental or intentional will have the effect of destroying it. On this subject the Privy Council remarks:—"Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family."—*Raja Rajkissen* v. *Ramjoy*, 19 W. R., 8, 12=I. L. R., 1 C., 186, 195.

For the validity of a family custom it is not necessary that the family should possess an estate which is technically known as a Raj in the north of India or a Polliem in the south of India: *Choudhry* v. *Nowlukho*, 2 I. A., 263, 269.

Customs and Usages.—Although the terms custom and usage are often used as convertible terms, still sometimes a distinction is drawn between them, and the former is applied to those rules of which *antiquity* is an essential incident, and the latter is used to designate those that may be of recent origin, such as those relating to trade or agriculture.

With respect to the nature and character of mercantile usage, the Judicial Committee observe:—"There needs not either the *antiquity*, the *uniformity* or the *notoriety* of custom which in respect of all these becomes a local law. The usage may be still

in course of growth; it may require evidence for its support in each case; but in the result it is enough, if it appear to be so well-known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract:" *Juggo* v. *Manik*, 7 M.I.A., 269, 282; 4 W. R., P. C., 8.

The same principles apply to an agricultural usage which may be of recent origin, lapse of a long period of time being not necessary for its growth; for instance, the usage of transferability of occupancy holdings may be established by evidence of transfers by the tenantry without the landlord's consent, to which no objection was made by him: *Dalglish* v. *Guzuffer*, I. L. R., 23 C., 427: 3 W. N., 21.

The Evidence of custom—should be unambiguous and such as to prove the antiquity, uniformity and continuity as well as the publicity of the usage, and the conviction of those following it that they were acting in accordance with law. The statements of experienced and competent persons of their belief that acts done in accordance with the usage are legal and valid are admissible as evidence, provided they be supported by actual examples of the usage asserted: *Gopal* v. *Raghupati*, 7 M. H. C., 250.

Instances in which the custom or usage was followed, especially Judicial decisions, in which the same was recognized, afford evidence of its existence: *Harnabh* v. *Mandil*, I. L. R., 27 C., 379. But a few instances of recent date are not sufficient to establish a custom that must be shown to have existed from time immemorial: *Luchmun* v. *Mohun*, 16 W. R., 179; *Kakarla* v. *Raja Venkata*, I. L. R., 29 M., 24; 16 M. L. J., 8.

But an agricultural or mercantile usage that need not be ancient may be proved by statements of persons who are in a position to know of its existence in their locality: *Sariatulla* v. *Pran*, I. L. R., 26 C., 184.

Sources of positive law.—It has already been indicated that the Smritis and Customs are the sources of the positive or lawyer's law. The definition given by Yájnavalkya, of Cause of Action, implies the same view: (Text No. 22). For, it is declared, that a Cause of Action arises when a person wronged in a manner *contrary* to the *Smriti or a Custom*, complains to the King. Manu also appears to support the same view; for, he ordains that the King should decide causes of suitors according to rules founded on *local customs and the codes of law:* (Text No. 20.).

But it has already been observed that certain innovations have been introduced by the later commentators of the Mahomedan period, and are contained in the Upa-Purânas or minor subsidiary Purânas which are modern compositions by Bráhmanical writers. It is on the authority of these spurious works, that some recent commentators maintain that certain practices, sanctioned or ordained by the Smritis must not be followed in this Kali age. Some of these practices were condemned by the Smritis themselves, some are declared by the Mitákshará and other principal commentaries to have ceased to be binding at present on the ground of the same being abhorred by the people, while the rest appear to have been opposed to the Bráhmanical interests. For instance, the caste superiority of Bráhmanas depended according to the Smritis entirely on the study of the sacred literature and on possession of superior merit, in the absence of which they could not claim to be better than Súdras. The object which these writers seem to have had in view, was, to secure by these innovations their hereditary superiority and exclusiveness by preventing mixture with lower castes. But Purânas cannot override the Smritis which are admittedly superior to the Purânas in authority. In order to obviate this difficulty, these comparatively recent commentators cite by the name of Smriti, those passages of these secondary Purânas which are विधायक-वाक्यानि, that is, which declare rules of conduct, or in other words, which enjoin men to do or abstain from doing anything.

Accordingly, the Pandits who were appointed to advise the judges of the British Indian Courts, on points of Hindu law and usage, misled them by incorrectly representing these innovations to be as authoritative as the Smritis.

And Sir William Jones was misled into giving prominence to certain passages of an Upa-Purâna on these innovations, by inserting their English version at the end of his translation of Manu's Code, which passages were palmed off on him, as Smritis or passages of law.

But it should be observed that the names of *Smriti* and *Purána* are given to different works; and while dealing with the relative authority of these *works*, the *Smritis* have been pronounced to be superior to the *Purânas*. Hence it is difficult to understand how some passages of the *Purânas* can be called *Smriti*.

It has already been observed that even passages of the Smriti, the origin of which may reasonably be traced to

covetousness of the priests, or selfishness of any persons, are to be rejected as spurious and fraudulent interpolations.

Hence these innovations, in so far as they appear to be dictated by improper motives of the writers, cannot be regarded to be of any weight; far less can they be treated as authority.

As regards the relative authority of Smritis and Customs when they are in conflict, it has already been shown that it is now settled law that the latter override the former.

But Kumárila Swámin and other commentators of the Mímánsá school of philosophy, who were opponents of the Buddhists and supporters of Bráhmanism, and took upon themselves the task of refuting the peculiar doctrines of Buddhism, felt themselves bound to maintain the superiority of the Sástras over human institutions, and were therefore unwilling to accept the authority of customs and usages that are contrary to the Sástras. Accordingly, those who reluctantly admitted the binding character of such customs and usages, did however, maintain that their authority should be confined only to the locality, or to the caste or the class of persons, where or among whom, they are found to prevail, that is to say, the authority of the Sástras should be curtailed only to that extent and no further.

Commentaries.—The Sruti and the Smriti are, theoretically speaking the sources of law. But all these are now practically replaced by the Nibandhas or digests or commentaries that are accepted as authoritative expositions of Hindu law in the different provinces. The commentators profess to interpret the law enunciated by the Smritis or Codes of Hindu law. A critical reader of the different commentaries on Hindu law will be impressed with the idea, that the positions maintained by them respectively, which are at variance with each other, cannot all be supported by the texts of the Smritis, which they profess to interpret, but which appear to have been made subservient to their views, by ringing changes upon the language of the texts, rather than correctly interpreted. This fiction of interpretation is found in every system of law. A rule of law is sometimes enlarged in its operation so as to include a case not covered by its language, or curtailed so as to exclude a case that falls within its terms: and this is designated rational interpretation based upon intention. Whenever you have a rule that is rigid in theory and you wish to get out of its terms, you must have recourse to the fiction mentioned above. This mode of changing law is not peculiar to Hindu

law, but is common to many systems of jurisprudence. The commentaries, however, have replaced the Smritis; and it is not open to any one to examine whether a particular position maintained by an authoritative commentary accepted as such in a locality, is really supported by the Sástras.

Clear texts and principles.—But it must not be supposed that the commentators have no respect for the Smritis, and have always disregarded or discarded them for the sake of any principle introduced by them. On the contrary when there is a clear and unambiguous text laying down a particular rule, effect is given by them to it, although the same is inconsistent with any principle referred to by them. In fact, they refer to common feature while dealing with individual cases, from which a general principle may be deduced. Our courts, however, have gone further, they have deduced such general principles from the particular cases, and applied them to other cases to which they were not intended to apply. The generality of the expressions that may be found in some instances were not intended to be expositions of the whole law, and cannot be taken to establish a proposition that may seem to follow logically from them, since the law is not always logical at all: (*Quinn* v. *Leathem*, H. L., 1901, A. C., 459). For instance, a text of Yama provides in clear and unambiguous language that the whole and the half brothers of a member of a joint family succeed equally to his share in the joint *immoveable* property, if succession opens to brothers. Effect is given to this text in the Dáyabhága, but the Calcutta High Court refused to follow it. Another instance is the curtailing of women's rights in inherited Strídhan property, by the deduction by our courts, of a general principle from the curtailment of the heritable right which Jímútaváhana for the first time conferred on women in the property of males even when members of joint families, which (curtailment) he effected on the authority of a particular text relating only to the widow's right to the husband's estate, but extended by him to the estate of all *males*, with respect to which only the law was changed by him, and not intended by him to be extended to Strídhan property, succession to which he had dealt with in a separate earlier chapter, where equal heritable right of sons and daughters in their mother's estate is clearly declared by him, so that it would not be reasonable to say that the daughters take a lesser interest than the sons, in the shares respectively allotted to them.

Of Hindu and Mahomedan periods.—The commentaries of the Hindu period appear to have been composed by practical lawyers, while those that came into existence during the Mahomedan rule, were written by "Sanskritists without law," who seem to be narrow-minded Bráhmanas having no concern with the administration of justice, and whose works are more religious and speculative than secular and practical, and contain many innovations of a retrograde character. The Mitákshará and the Dáyabhága, the two commentaries of paramount authority giving rise to the two principal schools of Hindu law, are works of the former description, compiled by persons of advanced views, who have developed and improved the Hindu law in many respects. There are many works of the latter description, including the treatises on adoption, which properly speaking, are not entitled to any authority as regards the novel rules sought to be introduced by them, upon the authority of the Upa-Puránas fabricated by Bráhmanical writers for the benefit of their own class.

Age of Dayabhaga.—Jímútaváhana the author of the Dáyabhága appears to have flourished in the last quarter of the eleventh and the first of the twelfth century of the Christian era. The evidence of his age, almost conclusive, is afforded by some passages of the Kála-Viveka another work of the same author, in which he states the occurrence of certain astronomical positions of the sun and the moon in the years 1013 and 1014 of the Saka era, in such a manner that the same appear to have been observed by himself, or to have occurred at his time and were well-known. This agrees with the account of Jímúta, given by Eru Misra in his Kula-Káriká or Social History of the Bengal Bráhmanas, in which he is stated to be the seventh descendant of Bhaṭṭa-Náráyana, one of the five learned and virtuous Bráhmanas who together with the five learned Káyasthas were sent by the King of Kányakubja the modern Kanauj at the request of A'disúra the King of Bengal, and who reached Gaur the then capital of Bengal, in the month of Magh of the year 999 of the Sambat era which is 57 years in advance of the Christian era which again is 78 years in advance of the Saka era.

As was anticipated above, it now appears from the account given by Eru Misra that Jímútaváhana was the Minister of Viswaksena a King of Bengal, and also Administrator of Justice, and was celebrated for his great learning. See Preface to the second edition of the Dáyatattwa.

Two Schools.—The different commentaries have given rise to the several schools of Hindu law, which are ordinarily said to be five in number. But properly speaking there are only two principal schools, namely the Mitákshará and the Dáyabhága Schools.

The Mitákshará which is undoubtedly anterior to the Dáyabhága is a running commentary on the Institutes of Yájnavalkya, by Vijnánesvara called also Vijnána-Yogin who cites texts of other sages, and reconciles them where they seem to be inconsistent with the Institutes of Yájnavalkya. This concise commentary is universally respected throughout the length and breadth of India, except in Bengal where it yields to the Dáyabhága, on those points only in which they differ; but it may be consulted as an authority even in Bengal, regarding matters on which the Dáyabhága is silent. The Dáyabhága, however, is not a commentary on any particular code, but professes to be a digest of all the codes, while it maintains that the first place ought to be given to the code of Manu. This commentary, or that portion of it which is now extant, is confined to the subject of partition or inheritance alone, whereas the Mitákshará is a commentary on all branches of law in its widest sense, professing as it does to elucidate the Institutes of Yájnavalkya.

The Mitakshara School—may be sub-divided into four or five minor or subordinate schools that differ in some minor matters of detail, and are severally accepted in the different provinces, where the Mitákshará is concurrently with some other treatises or with local customs, accepted as authority, the former yielding to the latter, where they differ.

Schools and Commentaries.—The schools, and the commentaries that are respected as authorities respectively, may be stated thus:—

Bengal School ..	Dáyabhága. Mitákshará. Dáyatattwa. Dáya-Krama-Sangraha. Víramitrodaya.
Benares School ...	Mitákshará. Víramitrodaya.
Mithilá School ...	Mitákshará. Viváda-Ratnákara. Viváda-Chintámani.
Bombay School ...	Mitákshará. Vyávahára-Mayúkha. Víramitrodaya.

Madras School	..	Mitákshará. Smriti-Chandriká. Parásara-Mádhava. Víramitrodaya.
I may add, The Punjab School	..	Mitákshará. Víramitrodaya. The Punjab customs, compiled in the Riwaz-i-am

The Víramitrodaya generally follows and maintains the doctrines of the Mitákshará. It refutes the contrary doctrines of the Bengal school, meeting the arguments put forward by the founder of that school and by his follower Raghunandana the author of the Dáyatattwa, to support the positions that are opposed to the Mitákshará school. In the unchastity case, (*Moniram* v. *Keri*, I. L. R., 5 C., 776 = 7 I. A., 115) the Judicial Committee held that the Víramitrodaya "may also, like the Mitákshará, be referred to in Bengal in cases where the Dáyabhága is silent."

The Schools of Hindu Law are recognized by the later commentators, and cite opinions of the founders of other schools thus, (इति प्राच्याः, or इति दाक्षिणात्याः, and so forth) so say the eastern lawyers or the southern lawyers.

Works on adoption.--The Dattaka-Mímánsá and the Dattaka-Chandriká are two treatises on adoption, which have come to be regarded as authority by reason of their being translated into English at an early period of British rule, and of the mistaken view of their being works of authoritative commentators: and it is said that where they differ, the latter is accepted as an authority in Bengal and in Madras; while the former is respected in the other schools. But the truth is that the first purports to be written by a Benares Pundit in the middle of the seventeenth century, and the second appears to be a literary forgery; and the innovations introduced by them were nowhere followed by the people in practice, nor is there any cogent reason why they should be.

Dattaka-Chandrika a literary forgery.—There is a great dispute regarding the authorship of the Dattaka-Chandriká. The work professes to have been written by Mahámahopádhyáya Kuvera. But notwithstanding, Sutherland, the learned translator, came to the conclusion that it was composed by the author of the Smriti-Chandriká, apparently from a misconception of the meaning of the sloka with which the book opens. The styles of the two works are so different that they cannot

be held to have been written by the same author. In Bengal, however, there is a tradition that it was a literary forgery by Raghumani Vidyábhúshana who was the pundit of Colebrooke. There are only two slokas in the book, composed by the author; the opening one misled the learned translator of the work into the opinion mentioned above, and the concluding one which is an acrostic, supports the Bengal tradition. It runs as follows :—

र—म्यैषा चन्द्रिका दत्त-पद्धते र्दर्शिका ल—घु ।

म—नोरमा सन्निवेशै-रङ्गिणां धर्म्मतार—णिः ॥

The tradition furnishes us with the account of the circumstances under which the book was written, and the internal evidence afforded by the book itself lends considerable support to it. The circumstances under which it was composed may shortly be stated thus: There was a well-known titular Raja of Bengal, who had adopted a son before a son was born to him. After his death a dispute arose between the real and the adopted sons regarding succession to the estate left by the titular Raja. The estate left by the Raja was supposed to be a Raj, and one of the questions raised was whether the adopted son could take a share of the Raj; and the other question was whether the adopted son could take an equal share with the real legitimate son, regard being had to the fact that the parties were *Káyasthas* of Bengal, who were taken to be Súdras. Both these questions were to be answered in the affirmative according to the exposition of law contained in this book, and the book itself is believed to have been written at the instance of the party claiming by virtue of adoption.

The Dattaka-Mima'nsa',—also appears to be written on purpose to invalidate the affiliation of a daughter's son. It is doubtful whether it was really written by Nanda Pandita. The biased and forced arguments advanced by its author in support of the innovations introduced by him, especially in the second Section, give rise to a suspicion that it is similar to the Dattaka-Chandriká as regards its origin.

There is no cogent reason for regarding these treatises as authority. But the adventitous circumstance of being translated into English at a comparatively early period, and the ignorance of their age, led the judges to treat them as authority. Justice Knox who is a Sanskrit scholar held that their authority is open to examination, explanation, criticism,

adoption, or rejection like any scientific treatises on European jurisprudence. But the Judicial Committee observes that their Lordships cannot concur with that learned judge, because, "such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements." Their Lordships, however, add,—" But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned judge."—*Sri Balusu v. Sri Balusu*, 26 I.A., 113, 132=I.L.R.,22 M., 398.

Collector of Madura *v.* **Mootoo Ramalinga.**—The following extract from the judgment of the Privy Council in the case of *Collector of Madura* v. *Mootoo Ramalinga Sathapathi*, in 12 M. I. A., 397, 435—throws considerable light on several points and should be carefully perused :—

" The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator puts his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. Thus the Mitákshará, which is universally accepted by all the schools except that of Bengal, as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the *Dáyabhága* in those points where they differ, was a commentary on the Institutes of Yájnavalkya ; and the Dáyabhága which, wherever it differs from the Mitákshará, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yájnavalkya. In like manner there are glosses and commentaries upon the Mitákshará which are received by some of the schools that acknowledge the supreme authority of that Treatise, but are not received by all. This very point of the widow's right to adopt is an instance of the process in question. All the schools accept as authoritative the text of Vasishtha, which says, ' Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithilá school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore, that a widow cannot receive a son in adoption, according to the Dattaka

form, at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayúkha and Kaustubha Treatises which govern the Mahrattá School, explain the text away by saying, that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers, it appears, that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.

"The duty therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governed the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, *clear proof of usage will outweigh the written text of the law.* * * *

"The highest European authorities, Mr. Colebrooke, Sir Thomas Strange and Sir William Macnaghten, all concur in treating as works of unquestionable authority in the South of India the Mitáksharà, the Smriti-Chandriká, and the Mádhavyam, the two latter being, as it were the peculiar Treatises of the Southern or Drávida School. Again, of the Dattaka-Mímánsá of Nanda Pandita, and the Dattaka-Chandriká of Devanda Bhatta, two Treatises on the particular subject of adoption, Sir William Macnaghten says, that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the provinces of Mithilá and Benares."

Mitakshara & Dayabhaga.—The Mitákshará is undoubtedly the earlier of the two leading treatises of paramount authority, and the Dáyabhága is deemed as an enactment amending the Mitákshará law in Bengal. This view follows from what is stated in the above case and also in *Bhugwandeen Doobey's* case: 11 M. I. A., 487, 507. And in the well-known case of *Kerry Kolitanee*, Justice Dwarkanath Mitter after referring to a passage of the Mitákshará in a Bengal case, explains the same view, in these words,—"It is true that there is no special

discussion on this point in the Dáyabhága, but the reason of this omission is obvious. The authority of the Mitákshará, it should be remembered, was at one time supreme even in *Bengal*, and as the author of the Dáyabhága did not intend to dispute the correctness of all the propositions laid down in that treatise, we need not be at all surprised at his silence in regard to some of them. It is for this reason that the Mitákshará is still regarded as a very high authority on all questions in respect of which there is no express conflict between it and the works prevalent in that school, as may be seen from the remarks made by the Privy Council in the case already referred to": 19 W.R., 367, 372; 7 I. A., 115, 126. See also *Akhay* v. *Hari*, I.L.R., 35 C., 721.

The Dáyabhága may also be referred to in a Mitáksharà case, on points in which the latter treatise is silent; and, in fact, all the commentaries of the different schools may be consulted on points in which the treatises regarded by any school as of special authority are silent, in the absence of conflict with any doctrine maintained by that school: *Rai Bishen* v. *Mt. Asmaida*, 11 I. A., 164, 179.

Non-Hindu view of Hindu Law.—Those that are not inclined to accept the Hindu idea of a divine origin of laws would have no hesitation to allow that they are based upon immemorial customs and usages, and call them the *unwritten* laws of India; and as being the law of the majority of the population, these may be deemed the Common Law of the country. But the Hindu Law is not now the territorial law of Hindusthan. In Hindu times the validity of customs such as have already been set forth, was admitted, so the law of inheritance, marriage, &c., under the Smritis, was not purely territorial. The Hindus however, had a complete Code of laws, both Adjective and Substantive, and the latter was discussed under eighteen heads called topics of litigation, which resemble the *actions* of the English Common Law.

Branches of Hindu Law, now in Force.—Under the British rule the Hindus have been suffered to be governed by their own law as regards Succession, Inheritance, Marriage, Religious Institutions, and Caste:—Reg. IV of 1793, Sec. 15. Hindu Law has therefore become the personal law of the Hindus.

The Jurisprudence or positive law as dealt with in the Codes of the Hindu sages appears to be complete and exhaustive, and includes all branches of law, suitable to the exigencies of Hindu society, and actually prevalent therein; so that it cannot be said that the Codes were defective, and

left out of consideration any department of law. And the charge of incompleteness brought forward by Sir Henry Maine in his Village Communities, in consequence of there being a singular scarcity of rules relating to tenure of land, and to the mutual rights of the various classes engaged in its cultivation,—appears to be erroneous and due to the misconception that the present system of land tenures which came into existence since the Permanent Settlement had always existed here. On the contrary, according to Hindu law the peasant was the proprietor of the land cultivated by him, and the ruling power was entitled not as Landlord but as Sovereign, to a certain proportion of the produce yielded by the land, not exceeding one-sixth, which was *tax* not *rent*, there being no words in the Sanskrit language for *landlord*, *tenant* and *rent*; and the relation upon which this payment was based is expressed by the conjoint word राजा-प्रजा-सम्बन्ध: meaning *relation of Sovereign and subject*, though this word is now used to convey the *relation of landlord and tenant*, but it embodies the true fundamental principle of the Land Revenue, and negatives the idea of the State being the Landlord or Proprietor of Land,—an idea contrary to the ancient law and customs of this country.

The Hindu Jurisprudence is divided into two parts: the first deals with adjective law under the name of Vyavahára-Mátriká meaning literary "mother of litigation", and the second deals with the substantive law. All possible wrongs were at first divided into eighteen classes, and there were eighteen Forms of Action corresponding to them: (Text No. 20). Later on another class was added to obviate the difficulty created by the earlier classification, similar to that which gave rise to the Court of Chancery in England, and another Form of Action was recognised corresponding to that class under the name of Miscellaneous प्रकीर्णकं, (Text No. 21), in which the proceeding commenced at the instance of the King, who had to be moved by parties in cases instituted for their benefit, when these cases could not come under any one of the eighteen Forms of Action.—See Introduction to the English translation of the Viváda-Ratnákara, pages XVII *et seq.*

English versions of Sanskrit law books.—Hindu law is locked up in Sanskrit the most perfect and difficult of the ancient classical languages: the codes and the commentaries are all written in it, to which our lawyers and judges have no access. They have, therefore, to acquire the knowledge of

Hindu law from the English versions of the Sanskrit works, the English text-books on Hindu law, and the reports and the digests of the case-law.

As regards the translations of works on Hindu law, a few purport to be done by persons who were either almost ignorant of Sanskrit, or had but a smattering of the same. The Viváda-Chintámani purports to be translated into English from the original Sanskrit by a Bengali gentleman who had very little knowledge of Sanskrit: it was translated into Bengali by a Pandit appointed by him, and then the Bengali version was done by him into English. This accounts for the many mistakes that are found in this work. The author of the English version of the Smriti-Chandriká also, had only an imperfect knowledge of Sanskrit.

It is remarkable that some persons are affected by a peculiar weakness which creates a hankering after the false reputation of being a Sanskrit scholar, which may no doubt be of some advantage to a lawyer. It is not difficult for an educated Hindu whose mother tongue is derived from Sanskrit, to pick up a smattering of Sanskrit, and to deceive those that are completely ignorant of it, by a show of his really second-hand knowledge, and to pass for a Sanskrit scholar before them; and sometimes such a person is found to become ultimately so self-deceived as to fancy himself a master of that language, which in truth he is not. Mistakes arise not only from the translator's imperfect acquaintance with the original, but there are various other causes and circumstances from which errors and imperfections creep into the English translation, even when done by genuine Sanskrit Scholars. The Sanskrit works on law cannot be fully understood even by a Sanskrit scholar except with the aid of learned Pandits familiar with the traditional interpretation of them.

Besides, lawyers and judges without Sanskrit, sometimes misconstrue and misunderstand the meaning of passages of the English versions, in consequence of their ignorance of the method of writing and the process of reasoning adopted by the commentators. The Full Bench decision in the case of *Apáji* v. *Rám*, I. L. R., 16 B., 29, furnishes an instance of misapprehension of the meaning of a passage of the Mitákshará by the majority of the learned judges.

The division of the English versions into small paragraphs, made by Colebrooke and other translators, solely for the convenience of reference, misleads the readers to think each of

these paragraphs to correspond to a verse in the original, and to be complete in itself, whereas the originals are written in prose, quoting passages from the Smritis, which are no doubt in verse, in the majority of instances, and a paragraph may be a link in a chain of argument extending over more than one paragraph.

Who are governed by Hindu law?—The Hindu law applies to Hindus by birth, that have not openly renounced Hinduism by adopting any other religious persuasion. Buddhists, Jainas and Sikhs of India who had been Hindus continued to be governed by Hindu law, notwithstanding their renunciation of the Hindu religion and usages, as there was no civil law intimately connected with their religion or system : and they are still amenable to Hindu law. The Hindus and the Buddhists were expressly excluded from the operation of the Succession Act, the present territorial law on the subject; and the Sikhs and the Jainas appear to have been included under the term 'Hindu' in that Act. Hindu perverts to Islamism are subject to the Mahomedan law of inheritance which forms part of their divine law. Some difficulty had been felt about the law to be applied to Hindu apostates to Christianity, there having been no territorial law on the subject before the passing of the Succession Act in 1865 A.D. Hindu law was applied to those that followed the customs and usages of the Hindus in other respects.

In the case of *Fanindra Deb Raikat* (I. L. R., 11 C., 463) the Judicial Committee have laid down that a family that was not Hindu by descent and origin, but had gradually adopted Hindu customs, was not, on that account, to be governed in all matters by Hindu Law unless proved to have been introduced into it as customs: and held that as the custom of succession upon adoption was not shewn to have been so, the party relying upon adoption had no title.

Renunciation of Hinduism and return:—The following observations of the Judicial Committee with respect to a Hindu becoming a Bráhma, and to a Hindu or a Sikh departing from the standard of orthodoxy in matters of diet and ceremonial observance, are of some practical importance in these days,—

"The learned judges of the Chief Court examined the literature bearing upon the Bráhmo Society; they had before them much important evidence with reference to the Bráhmos and the relation of their principles and their organization to the Hindu system; and they came to the conclusion that a Sikh or a Hindu by becoming a Bráhmo did not necessarily

cease to belong to the community in which he was born. They also found on the evidence that the testator never became a professed Bráhmo at all. In both these conclusions their Lordships agree.

"Their Lordships agree with the learned judges of the Chief Court in thinking that such lapses from orthodox practice (in matters of diet &c.) could not have the effect of excluding from the category of Hindu in the Act (V of 1881) one who was born within it, and who never became otherwise separated from the religious communion in which he was born." *Rani* v. *Jogendra*, 30 I. A., 249, 257.

A Hindu who has renounced Hinduism is entitled to revert to Hinduism after having performed the religious rite of expiation and repentance (प्रायश्चित्तम्). Accordingly his infant son can with his consent and approval also revert in the same manner, and can therefore be given in adoption to a Hindu: *Kusum* v. *Satya*, I. L. R., 30 C., 999.

Migration and School of Law.—The Schools of Hindu Law applying as they do to Hindus of particular localities, may be called *quasi*-territorial. Hence it is the *primâ facie* presumption that a Hindu is governed by the school of law in force in the locality where he is domiciled. But this presumption may be rebutted by proof that the family to which he belongs had migrated from another province in which a different school prevails; for, in such a case, the presumption of law is in favour of the retention by the family, of the law and usage of the country of its origin. But this presumption again may be rebutted by proving that the family has adopted the law and customs of the place of its present domicile, and then it will be subject to the School prevailing in that place: (*Ram* v. *Chandra*, I. L. R., 20 C., 409; *Soorendra* v. *M. Heeroomonee*, 10 W.R., P. C., 35; *Lukkea* v. *Gunga*, W. R., G., 56).

The mode in which the religious ceremonies are performed is relied on as the test for determining whether a family proved to have migrated from one province to another, adheres to the law of the former place or has adopted the doctrines prevalent in the place of its new domicile: (*Rutchputty* v. *Chandra*, 2 M. I. A., 132; *R. Padma* v. *B. Dooler*, 4 M. I. A., 259; *R. Srimuty* v. *R. Koond*, 4 M. I. A., 292; *Ram* v. *Kaminee*, 6 W. R., 295).

It should be observed that it is of the first importance to enquire into the origin of the family. The origin, if ascertained to have been in a different place, gives rise to the presumption that the family preserves the customs of its place

of origin. Of evidences which go to prove or rebut this presumption, the most direct are instances of succession in the family, and next, ceremonies at marriages, births and Shrádhs. *Parbati* v. *Jagadish*, 29 I. A., 82 = I.L.R., 29 C., 433 = 6 W.N., 490.

By marriage the wife acquires the domicile of the husband, and the domicile continues during the widowhood unless she adopts a new domicile ; *Kashiba* v. *Shripat*, I. L. R., 19 B., 697.

Statutes on Hindu law.—The Hindu law has to a certain extent been modified and supplemented, (1) by legislative enactments, and (2) by judicial decisions of the highest tribunals in England and India.

The Acts relating to Hindus are—Act XXI of 1850, cited as the *lex loci* Act, which repeals those provisions of the Hindu and the Mahomedan laws, that exclude from inheritance persons professing a religion different from that of the person, succession to whose estate is in dispute ;

Act XV of 1856, which legalizes the re-marriage of Hindu widows in certain cases, and declares their rights and disabilities on re-marriage ;

And Act XXI of 1870 called the Hindu Wills Act and Act V of 1881 called the Probate and Administration Act, which extend to Hindu Wills certain provisions of the Succession Act with some additions and alterations.

Case law.—I now come to the most important source of the present Hindu law, namely, the case-law consisting of the decisions of the Judicial Committee of His Majesty's Privy Council, and of the Highest Courts of Justice in this country. These have practically superseded the Nibandhas or Commentaries. These decisions immediately affect the parties to the suits, but as precedents they are binding on the entire community. In applying the law to particular cases, the judges expressly or by necessary implication enunciate what the law is : and the view of the law expressed and acted upon by them serves as a guide in similar cases arising subsequently, and is taken to have a binding force. An expression of opinion on a point of law, not necessary to be determined for the purpose of deciding the case, though respected, is not considered to be binding and is called an *obiter dictum*.

European authorities and judges.—The Hindu law as contained in the Commentaries is silent on many points of detail, and the judges of the superior courts have had to supply this deficiency by laying down rules on such points as they were

called upon to decide. The administration of the Hindu law by the English judges shows forth in clear light the administrative capacity, the indomitable energy, the scrupulous care and the strong common sense of the English nation. They commenced to administer justice with the aid of Pundits appointed to advise them on Hindu law. Within a short time the leading treatises and a few others were gradually done into English by Sir W. Jones, Mr. Colebrooke and Mr. Sutherland. Systematic and concise treatises on Hindu law were also composed by Sir F. Macnaghten, Sir T. Strange and Sir William Macnaghten. The opinion of these learned text-writers is respected as being based upon considerable research, and consultation with learned Pandits. It cannot but be admitted by an impartial and competent critic on perusing the reports of cases, that in the majority of instances the conclusions arrived at by the English Judges are perfectly consistent with the law and feelings of the Hindus. But there were difficulties almost insurmountable by foreigners in the way of a correct understanding and appreciation of the argumentative works on a system of ancient law suited to the condition and the feelings of a people, opposed to their own ; especially when they had no access to the original books, and the principles of the system of reasoning, followed by the Hindu writers. The rules of Hindu law on many points *seemed* to the English lawyers to be vague and capable of diverse interpretations. Where therefore arguments *pro* and *con* seemed to them to be equally balanced on any particular point of law they would naturally be disposed to adopt a view that accorded with their own feelings, associations and *præsumptiones hominis*, but which might be altogether opposed to the Hindu view.

In this connection should be read the following observations made by the Judicial Committee in the case of *Runguma* v. *Atchama*, (4 M.I.A., 1, 97):—"At the same time it is quite impossible for us to feel any confidence in our opinion upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindus, with which we cannot be familiar."

The learned writers mentioned above who are called European authorities on Hindu law, are entitled to the gratitude of the general body of Hindus for having brought to light, as it were, their law which had been locked up in a dead language,

the knowledge of which was practically the monopoly of the Bráhmanical hierarchy, who would teach it to none but the members of the regenerate classes.

Sanskrit learning.—Although the members of all the regenerate classes were entitled to *learn* the Sástras, yet the Bráhmanas claimed for themselves the exclusive privilege of *teaching* them. The regenerate classes other than the Bráhmanas have almost disappeared by reason of the prevalence of Buddhism for many centuries, and the subsequent compromise between the Bráhmanism and the Buddhism in the shape of the Tántric system; so that in Bengal if the Bráhmanas, a few Rájputs claiming to be Kshatriyas, and a section of the Vaidyas claiming to be a mixed regenerate class, be excepted, the rest of the Hindus who form the majority and include the other regenerate castes that had adopted Buddhism and had consequently renounced all claims to superiority by birth, and therefore still follow some of the practices prescribed by the Sástras for Súdras, are all deemed to be Súdras, though many of them are no doubt, either Súdras or inferior to them. The Bráhmanas were so jealous of their exclusive privilege of Sanskrit learning, that even the Pandits who accepted the appointment of professors in the Government Sanskrit College of Calcutta, established in 1824 A.D., and who were on that account considered heterodox by the more orthodox members of their own class, could not be induced to impart instructions to students belonging to other than the twice-born castes, so that the Government was at first compelled to adopt the rule that none but boys of the regenerate classes could be admitted as students of that College. It was in 1848 A.D., that the Káyasthas who claim to be Kshatriyas by descent, and later on, other classes of Hindus, obtained the privilege of becoming students of that College. It was, however, not so much by the action of the Government in conferring the privilege on all Hindus, of reading in the Sanskrit College, as by the action of the Calcutta University in making Sanskrit the compulsory second language for study by Hindu students, that Sanskrit learning has been disseminated amongst Hindus. Previously Sanskrit was not taught in our English schools and colleges, and the result was that the Hindu students of all classes, educated in those schools, who had graduated before 1869 A.D., were as a general rule ignorant of the classical language of their own country.

Queen Victoria and British Rule, Defender of Hindu Faith.—The selfish policy pursued by the Bráhmanas for maintaining the

superiority of their class by means of their monopoly of the Sanskrit learning, and the practical exclusion of other classes from the same, could not but re-act on themselves: and the natural consequence of such an ignoble and illiberal principle must necessarily be, as it was, that the knowledge of Sanskrit, became ultimately confined to a few Bráhmana families only, the members of which sought to maintain their own superiority by the application of that very principle, by throwing obstacles in the way of acquisition of learning by members of other families of even their own class. The quality of learning must in such circumstances necessarily deteriorate when competition is narrowed by excluding the majority of the people from acquiring the same. And the ultimate effect of all this was, the degradation and downfall of the Hindus.

The British rule has conferred immense good on the people of this country by the spread of education and by other civilising institutions introduced by it. The people of the present day are not aware of the intellectual, moral and religious thraldom, and the divers disabilities under which the general body of the Hindus laboured, and which have been, and are silently and gradually being, removed by the benign influence of the British rule. It is indeed a very high privilege conferred by the British Government on the general body of the Hindus, that they do now enjoy an easy access to their sacred books which were beyond the reach not only of the ordinary people, but also of the Hindu students of the former English schools without Sanskrit. Englishmen as well as the people of this country will perhaps be astonished to hear that practically the British Government has bestowed on the mass of the Hindus the privilege of perusing their own religious books, which is expressly denied them by the Bráhmanical legislation providing severe punishment for Súdras trying to pry into the sacred literature. And such was the ignorance of the religious truths taught in the sacred books, that the English-educated Hindus including even Bráhmanas had their faith in their religion considerably weakened, and some of them had recourse to other systems of faith. But with the revival of Sanskrit learning, and an easy access to the sacred books there has been a revival of the Hindu faith to an extent unknown before. And as it is during Queen Victoria's prosperous and glorious reign, that this grand consummation has taken place, Her Majesty may properly be styled the Defender of the Hindu Faith. The Hindu religion being moulded on the principles of

asceticism, the revival of the Hindu faith can by no means be politically dangerous, as is erroneously thought by some persons.

Tying up of property, and alienation.—The law of an independent country may be taken to represent the character and feelings of the people. For instance, the English law is said to abhor the tying up of property: and regard being had to the fact that its people are characterized by prudence and self-reliance, and that a high tone of morality is generally prevalent amongst them, the above feature of the English law is required by the exigencies of English society and conducive to its welfare. But the same rule cannot be applied to India, where the state of things is quite different, and where the tying up of property was the general rule, and alienation of it could be justified only for special causes. If we bear in mind that India is an agricultural and not a commercial nor a manufacturing country, that its people are more subjective than objective, that the caste of the Hindus debars them from the freedom of choice in respect of a calling or occupation, that the father gets his minor sons married, and the sons look to the ancestral property for the support of themselves and of their family, we cannot entertain any reasonable doubt that the rule of Hindu law which imposes limitations on the father's right of alienation of the ancestral property, except for legal necessity, was the most salutary one. And what the exigencies of Hindu society require, and whether it requires a change in the law, are questions most difficult to solve. And I may say without meaning any offence that the effect of an exclusive English education has been more or less to anglicize its Hindu recipients in their ideas and feelings, and to create a wide gulf between them and the bulk of the Hindu community who retain their old habits of thought.

The safest principle to follow seems to be that the Hindu law as it is, should in all cases be adhered to, and no change should be introduced under the pretext of interpreting the same: the Legislature may be appealed to should any rule of law require a change.

It is remarkable that as regards the treatment of debtors and creditors the Legislature and the Highest Tribunals appear to be guided to a certain extent by opposite principles. While the Legislature thinks that in this country the debtors should be protected against the creditors, and passes such Acts as the Chota-Nagpore Encumbered Estates Act, the Oudh Encumbered Estates Act, and the Deccan Ryots Relief Act, for the

protection of the debtors, and recognizes the same principle in framing the Bengal Tenancy Act which does not allow the voluntary transfer of occupancy rights; our courts of justice are changing the Mitákshará law by enabling the father's creditors to seize and sell the family property, and to deprive the family of its hereditary source of maintenance.

Development of Hindu Law by our Courts.—As you are required to read certain chapters of the Mitákshará and the Dáyabhága, I think it my duty to point out to you the principal points in which there seems to be a divergence between the Commentaries and the judicial decisions. They are as follows:

1. That there is no distinction in Bengal between the grand-parental or ancestral and the father's self-acquired property as regards his power of alienation when he has male issue.

2. That the Hindus governed by the Dáyabhága School, and others in respect of their separate property, have the power of testamentary disposition.

3. That in Bengal a son has not even the right of maintenance as against his father possessed of property.

4. That according to the Mitákshará School the son's interest in the ancestral property is liable for the payment of the father's debts if not contracted for an illegal or immoral purpose.

5. The alteration in the order of succession according to the Dáyabhága and its well-understood traditional interpretation.

6. The curtailment of the rights of females under both the Schools of law, and especially of those under the Mitákshará law by extending the Dáyabhága principles to them.

7. The theory that an adopted son is entitled to all the rights and privileges of a real legitimate son, save and except those that have been expressly withheld from him.

You will observe that the second and the third propositions depend upon the first, which again seems to have been arrived at by a misapplication of the doctrine of *factum valet*. A careful perusal of the second chapter of the Dáyabhága will convince the reader that the father's estate in ancestral immoveable property resembles the Hindu widow's estate, with this difference that the restrictions on the father's right of alienation except for legal necessity, are imposed upon his estate for the benefit of his male issue, whereas the limitations on the widow's estate form the very substance of its nature, and are imposed upon her not merely for the benefit of reversioners. If the intention of the founder of the Bengal School had been to imply that a father

is, as against his male issue absolute master of the ancestral real property, he would not have entered into a long discussion in order to maintain that on partition of such property, the father is entitled to a share twice as much as is allotted to each of his sons. To argue out at great length that the father on partition of ancestral property is entitled to a double share, and at the same time to declare him the absolute owner of the ancestral estate, would be like the ravings of a madman, to use a favourite expression of the Hindu commentators. The misapprehension appears to have arisen from the extension to ancestral property, of the doctrine of *factum valet* which relates to the property acquired by the father himself.

The acute English lawyers that were connected with the Supreme Courts, either as judges or as advocates, or solicitors are responsible for some of the changes noted above. The Calcutta Supreme Court had to deal mostly with the Bengal school, and its decisions were respected by the Sudder Court that had to administer three schools of Hindu law, prevalent in the territories within its jurisdiction, in the greater portion of which the Dáyabhága is followed. The judges and the pleaders of the latter Court were more familiar with the Bengal law, and unconsciously extended the Dáyabhága rules to the Mitákshará cases. And when this had been done in some cases, and the correctness of the decision was then called into question, it was held to be too late to re-open the point: for, *Communis error facit jus.*

In early times women laboured under great disabilities, the Mitákshará confers on them rights and privileges so as to place them almost on a par with men. In some respects women are placed by the founder of the Bengal School in a more favourable position than what they occupy under the Mitákshará, but it is fenced in by limitations. The Mitákshará females have been subjected to Bengal limitations, while the advantageous position enjoyed by the Bengal females could not be given them. Under both the schools, however, the law relating to females appear to have been construed rather against them. It may be that the Anglo-Hindu lawyers could not conceive the idea that in India which is so backward in material civilization, females could enjoy privileges that were denied to them in England.

The order of succession according to the Bengal School has also been changed upon the erroneous assumption that it is based entirely upon the *pinda* theory introduced by the founder

of the school. And the theory has been so explained as to render the order of succession expressly laid down by Jímúta-váhana, inconsistent with the theory attributed to that acute logical writer. According to the present view, a fraternal nephew's daughter's son is to be preferred to the nephew's son's son, a cognate taking in preference to an agnate of the same degree, although they would succeed in the reverse order to the estate of the brother and the nephew, through whom they are related to the *propositus*: a somewhat unique development of law, opposed to the very spirit of Hindu law, and unknown to any other system of Jurisprudence. It is a doctrine to which no Hindu Pandit versed in Hindu law, can be found to give his assent.

Stare decisis & Communis error facit jus.—Whilst making the above observations, I must ask you to specially note that the law as laid down in the decided cases must be accepted for the present as settled law, and justice will be administered in the courts in accordance therewith, so long as they are not upset by authority. When a particular view of law has been taken in a series of cases, the judges though convinced of its erroneousness, think themselves bound to follow it, for otherwise they might disturb innummerable titles. But having regard to the facts that the people of this country are extremely conservative and tenaciously adhere to their customary law, that they do oftener consult the Pundits than lawyers on matters of Hindu law, that justice is administered by the highest tribunals in a language strange to the people, and that the case-law is not made accessible to the people by translating the reports of cases into their languages, it is doubtful whether the strictest adherence to the maxim *stare decisis* is justifiable in all matters.

In the recent case of *Bhagwan Sing* v. *Bhagwan Sing*, the Lords of the Judicial Committee are reported to have observed :—"For 80 or 90 years there has been a steady current of authority one way, in all parts of India. It has been decided that the precepts condemning adoptions such as the one made in this case are not monitory only, but are positive prohibitions, and their effect is to make such adoptions wholly void. That has been settled in such a way and for such a length of time as to make it incompetent to a Court of Justice to treat the question now as an open one:"—26 I. A., 153 = I.L.R., 21 A., 412.

In another recent case, their Lordships have declared that

Communis error facit jus is a sound maxim : *Jagdish v. Sheo*, 28 I.A., 100 (109) = 5 W.N., 602.

It is submitted with the greatest deference that the principles upon which the rule embodied in this maxim is founded, seem to be inapplicable to India. In England "the courts are reluctant to upset former decisions which although anomalous, have been *accepted by the public as the basis of their transactions* for a length of time." There the Judges are the repositories of the law, and are perfectly familiar with the actual usages of the public, of which they are the leading and eminent members. But the English Judges administering Hindu law have no access to its original sources locked up in a dead though classical language with which they are not acquainted; nor are they familiar with the actual usages, ideas and sentiments of the Hindu community so different from theirs. On the other hand, the people of this country have no access to the decisions of the superior courts of which the proceedings are conducted and recorded in a language not their own, so that the public here, far from accepting the decisions as the basis of their transactions, continue to adhere to their own law notwithstanding the erroneous view of the same taken in the precedents unknown to them as well as to their advisers, the Pandits. Thus the public here are no parties to the *communis error* which is confined to the courts alone; and so the law of the courts in these respects has become different from the law of the people, and the reluctance of the courts to upset the decisions has the effect of disturbing settled and cherished arrangements and transactions made by the public on the basis of their customary law. It is difficult to understand why this aspect of the question has escaped the attention of the sages of law adorning the Judicial Committee. It seems that either the grounds for distinction in this respect between the two countries are not noticed by the English lawyers practising in the Privy Council, or they feel so great a veneration for the traditions of the British courts that they do not think it possible to call into question before English Judges the propriety of applying to Indian cases the traditional rule embodied in the maxims, and therefore the attention of their Lordships is not invited to this question. Accordingly their Lordships think that the long acceptance by the courts of a particular doctrine or view of Hindu law, though incorrect, has the same effect here as in England, upon social customs, and that the acceptance of a different though correct view would probably disturb recognised law and settled arrange-

ments: whereas the contrary is found to be the actual case in this country. And although their Lordships go so far as to say that the acceptance of a doctrine for 80 or 90 years by all the courts would "make it incompetent to a court of justice to treat the question as an open one;" still this fact ought to be submitted to their Lordships that the people here ignorant of what passes in the Courts, follow their customary law and usage which are contrary to that doctrine but which are agreeable to their feelings, as is proved by the facts of the very case in which that observation was made; and if they happen to be informed of the view entertained by the courts, they endeavour by means of deeds and wills to guard against their arrangements being upset by the courts, in consequence of the same being contrary to the precedents. For instance, the adoptions that are held in the above case to be wholly void, are believed by the regenerate Hindus to be perfectly valid according to their Shasters, and accordingly they are found to adopt a daughter's or sister's son or the like and to devise by wills their estate to the son so adopted, for the purpose of preventing litigation that might otherwise arise for impugning the validity of the adoption.

It is, therefore, to be regretted that their Lordships did not consider the question whether these maxims should be followed in all cases governed by Hindu law, specially in cases where the acceptance of the right view is not likely to disturb many titles, as where restrictions have been erroneously imposed on the nature of heritable right, or where the liberty of action and choice has been wrongly curtailed in matters which ought to be, as they really are under Hindu law, left to the discretion of men.

Application of stare decisis—The view of law taken by the courts in previous decisions, which was justified by the particular facts of those cases, is sometimes erroneously applied to other cases in which there are certain different facts which were not considered on the previous occasions, and to which that view is inapplicable and was not intended to apply. The following two observations of the Lord Chancellor with respect to the use and application of precedents are important and instructive:—"One is, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of expressions which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what

it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."—*Quinn* v. *Leathem*, L. R., Appeal Cases 1901, p. 495, 506.

CHAPTER II.

DEFINITIONS.

ORIGINAL TEXTS.

१ । सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते ।
समानोदकभावस्तु जन्मनाम्नोरवेदने ॥ मनुः— ५ । ६० ।

1. But the *sapinda* relationship ceases in the seventh degree (from the father and the mother); *samánodaka* relationship, however, ceases if the descent and the name are unknown.—Manu v. 60.

२ । सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते ।
समानोदकभावस्तु निवर्त्तेताचतुर्द्दशात् ।
जन्मनाम्नोः स्मृतेरेके तत्परं गोत्रमुच्यते ॥
मिताक्षराधृत वृहन्मनुवचनम् ।

2. But the *sapinda* relationship ceases in the seventh degree; the *samánodaka* relationship, however, ceases after the fourteenth; according to some, it exists if the descent and the name are remembered: the word *gotra* is declared to comprise these, (*i.e.* Sapiṇdas and Samánodakas.)—Vrihat-Manu cited in the Mitákshará 2, 5, 6.

३ । प्रपितामहः पितामहः पिता स्वयं सोदर्य्या भ्रातरः सवर्णायाः पुत्रपौत्रप्रपौत्राः एतान् अविभक्तदायादान् सपिण्डान् आचक्षते । विभक्त-दायादान् सकुल्यान् आचक्षते । सत्स्वङ्गजेषु तद्गामी ह्यर्थो भवति सपिण्डा-भावे सकुल्यः तदभावे चाचार्य्योऽन्तेवासी ऋत्विग्वा हरेत् तदभावे राजा ॥
दायभागधृत-बौधायनवचनम् ।

3. The paternal great-grandfather, the paternal grandfather, the father, the man himself, his brothers of the whole blood, his son and son's son

and son's son's son by woman of the same tribe: all these participating in undivided *daya* or heritage are pronounced *sapindas*. Those who participate in divided *daya* or heritage, are called *sakulyas*. Male issue of the body being left, the property must go to them; on failure of *sapindas*, the *sakulyas*, (and) in their default, the preceptor, a pupil, or the priest, (and) in default of these, the king shall take (the property.)—

Baudáyana cited in tha Dáyabhága, xi, i, 37.

[The author of the Dáyabhága takes the word "*daya*" in this text, to mean *pinda* or funeral oblation. See D. B., xi, i, 38.]

४ । त्रयानाम् उदकं कार्य्यं त्रिषु पिण्डः प्रवर्त्तते ।
चतुर्थः सम्प्रदातैषां पञ्चमो नोपपद्यते ॥
अनन्तरः सपिण्डाद् यस्-तस्य तस्य धनं भवेत् ।
अत-ऊर्द्ध्वं सकुल्यः स्याद्-आचार्य्यः शिष्य एव वा ॥

मनुः—९ । १८६-१८७ ।

4. To three must libations of water be made, to three must *pinda* or oblations of food be presented; the fourth is the giver of these offerings; the fifth has no concern with them. Whoever is the unremote from (among) *sapinda*, his property becomes his. After him the *sakulya* is the heir, then the preceptor or a pupil.—Manu ix. 186-187.

[The third line in the above extract from Manu has been translated by Colebrooke, thus: "To the nearest *sapinda*, the inheritance next belongs." I have given the literal rendering for the purpose of showing the peculiar wording of the line, such as requires grammatical explanation.]

५ । अविप्लुत-ब्रह्मचर्य्यो लक्षण्यां स्त्रियम् उद्वहेत् ।
अनन्यपूर्व्विकां कान्ताम् असपिण्डां यवीयसीं ।
अरोगिणीं भ्रातृमतीम् असमानार्ष-गोत्रजां ।
पञ्चमात् सप्तमाद् ऊर्द्ध्वं मातृतः पितृतस्तथा ॥

याज्ञवल्क्यः । १।५२।५३ ।

5. Let a man who has finished his studentship of the Vedas or sacred literature, espouse an auspicious woman who is not defilled by connection with another man, is agreeable, *non-sapinda*, younger in age and shorter in stature, free from disease, is born from a different *gotra* and *pravara*, *and is beyond the fifth and the seventh from the mother and from the father (respectively).*"—Yájnavalkya, 1, 52-53.

[These two Slokas are in that part of Yájnavalky's Institutes, where the subject of marriage is dealt with. The Mitákshará which is a running commentary on the Institutes, explains the term non-*sapinda* in the above text in the following passage,—]

६। **असपिण्डां** समानः एकः पिण्डो देहो यस्याः सा सपिण्डा न सपिण्डा असपिण्डा ताम्। सपिण्डता च एकशरीरावयवान्वयेन भवति। तथाहि पुत्रस्य पितृशरीरावयवान्वयेन पित्रा सह सापिण्ड्यम्। एवं पितामहादिभिरपि पितृद्वारेण तच्छरीरावयवान्वयात्। एवं मातृशरीरावयवान्वयेन मात्रा। तथा मातामहादिभिरपि मातृद्वारेण। तथा मातृष्वसृमातुलादिभिरपि एकशरीरावयवान्वयात्। तथा पितृव्यपितृष्वस्रादिभिरपि। तथा पत्न्या सह पत्युः एकशरीरारम्भकतया। एवं भ्रातृभार्याणामपि परस्परम् एकशरीरारब्धैः सह एकशरीरारम्भकत्वेन। एवं यत्र यत्र सपिण्डशब्दः तत्र तत्र साक्षात् परम्परया वा एकशरीरावयवान्वयो वेदितव्यः।

यद्येवं मातामहादीनामपि "दशाहं शावम् आशौचं सपिण्डेषु विधीयते" इत्यविशेषेण प्राप्नोति। स्यादेतत् यदि तत्र "प्रत्तानाम् इतरे कुर्युः" इत्यादि विशेषवचनं न स्यात्। अतश्च सपिण्डेषु यत्र विशेषवचनं नास्ति तत्र "दशाहम्" इत्येतद्वचनम् अवतिष्ठते।

अवश्यं चैकशरीरावयवान्वयेन सापिण्ड्यं वर्णनीयम्। "आत्मा हि यज्ञे आत्मनः" इत्यादिश्रुतेः। तथा "प्रजाम् अनुप्रजायसे" इति च। "स एवायं विरूढः प्रत्यक्षेणोपलभ्यते" इत्याद्यापस्तम्बवचनाच्च। तथा गर्भोपनिषदि—"एतत् षाट्कौशिकं शरीरं, त्रीणि पितृतस्त्रीणि मातृतः, अस्थिस्नायुमज्जानः पितृतः त्वङ्मांसरुधिराणि मातृतः" इति तत्र तत्रावयवान्वयप्रतिपादनात्। निर्वाप्य-सपिण्डान्वयेन तु सापिण्ड्ये मातृबन्धूनां भ्रातृतत्पुत्रादिषु च सापिण्ड्यं न स्यात्। समुदायशक्त्यङ्गीकारेण रूढिपरिग्रहे अवयवशक्तिश्च तत्रावगम्यमाना परित्यक्ता स्यात्। परम्परयैकशरीरावयवान्वयेन सापिण्ड्ये यथा नातिप्रसङ्गस्तथा वक्ष्यामः।

6. **Non-sapinda'm**—She whose *pinda* i. e. body, is the same *i.e.*, one, is *sapinda*; one who is not *sapinda* is *non-sapinda*. Sapinda relationship arises from conneetion with parts of one body: accordingly, a son's *sapinda* relationship with the father arises by reason of connection with parts of the father's body; similarly (Sapinda relationship) also with the paternal grandfather and the like (arises) by reason of connection with parts of his body through the father; similarly with the mother, by reason of connection with parts of the mother's body; likewise, with the maternal grandfather and the rest, through the mother; similarly, also with the mother's sister, the maternal uncle and the like, by reason of connection with one body; so also with the paternal uncle, the father's sister and the like; similarly (arises the *sapinda* relationship) of the husband with the (*Patní*) lawfully wedded wife, by reason of (they together) forming one body, (*i. e.*, one person, hence the wife is called half the body of the husband); similarly also (arises the *sapinda* relationship) of the wives of brothers (with each other), by reason of (the wives) forming one body reciprocally with those (*i. e.* their husbands) formed from one body (of their father): thus wherever the term *sapinda* is used, there directly or mediately connection with parts of one body is to be understood.

(It is objeeted), if it be so, then the text, namely,—'Obituary pollution for ten days is ordained among *sapindas*"—would without distinction apply also to the maternal grandfather and the like (cognates). (The answer is), that would have been the case, had there not been

special provision (by way of exception) such as,—"In the case of married females, pollution is observed by others (not by their paternal relations.)" Hence where there is no special text relating the *sapindas*, there the (general) ordinance, namely, "Obituary pollution for ten days &c.," remains (as the one to be applied).

Sapinda relationship, however, must be explained as arising by connection with parts of the body ; by reason of the (Sruti) revelation, namely,—"One's own self (in the shape of son) is born from one's own self (in the shape of father), &c." ; likewise, also by reason of another revelation, namely, "Thou art (thyself) born as offspring" ; and by reason of the text of A'pastamba, namely,—"That one's own self is born as son, is visible by perception" ; likewise, by reason of the connection with (particular) parts of the father's and the mother's bodies being established in the Garbha-Upanishad (Upanishad dealing with child in the womb), thus,—"This body is composed of six constituents, three (are derived) from father, (and) three from mother ; bone, nerve and marrow from father, (and) skin, muscle and blood from mother." But if *sapinda* relationship were by connection through *pinda* in the sense of oblations presented to deceased ancestors, then there would be no *sapinda* relationship with the mother's line of ancestors, and also with the brother and his son and the like ; and if that meaning of the word *sapinda* were accepted as traditional, upon the assumption that the whole word (irrespective of its components parts) has the power of expressing that meaning (by traditional usage), then, the power of the several constituent parts (of this word *sa-pinda*, namely *sa* and *pinda*) to express their respective apparent meanings would have to be rejected. It will be stated (hereinafter) how *sapinda* relationship by mediate connection with the parts of one body (has been curtailed and so it) would not include those that are not intended.

[The sentence in the above passage of the Mitákshara, relating to the *sapinda* relationship of husband and wife has been erroneously translated by West and Buhler in their Digest of Hindu Law p. 121, 3rd Edition, thus,—

"So also the wife and the husband are *sapinda* relations to each other, because they produce one body (the son)."

The sentence has similarly been wrongly rendered in the Tagore Law Lectures of 1880, p. 601, thus,—

""So with the wife, by reason of her being a common generator of the same body (the son)."

These learned writers misunderstood the meaning of the Sanskrit words as well as the purport of the sentence. According to their version the husband and the wife would not be *sapindas*, until and unless a son be born to them, and consequently they would not be *sapindas* at all to each other, should they be destitute of issue ; whereas they do become each other's *sapinda* from the moment of their marriage.]

७। असपिण्डाम् इत्यत्र, एकशरीरान्वयद्वारेण साक्षात्परम्परया वा सापिण्ड्यमुक्तं, तत्र सर्वत्र सर्वस्य यथाकथञ्चिदनादौ संसारे भवतीत्यतिप्रसङ्ग इत्यत आह —

पञ्चमात्सप्तमादूर्ध्वं मातृतः पितृतस्तथा ।

मातृतो मातुः सन्ताने पञ्चमादूर्द्धं पितृतः पितुः सन्ताने सप्तमादूर्द्धं सापिण्ड्यं निवर्त्तत इति शेषः। अतश्चायं सपिण्डशब्दोऽवयवशक्त्या सर्व्वत्र प्रवर्त्तमानोऽपि निर्मन्थ्यपङ्कजादिशब्दवन्नियतविषयएव। तथा च पित्रादयः षट् सपिण्डाः पुत्रादयश्च षट् आत्मा च सप्तमः, सन्तानभेदेऽपि यतः सन्तानभेदस्तमादाय गणयेत्-यावत् सप्तमः इति सर्व्वत्र योजनीयम्। तथाच मातरमारभ्य तत्पितृपितामहादिगणनायां पञ्चमपुरुषवर्त्तिनी मातृतः पञ्चमीत्युपपद्यते। एवं पितरमारभ्य तत्पित्रादिगणनायां सप्तमपुरुषसन्तानवर्त्तिनी पितृतः सप्तमीति। तथाच "भगिन्योर्भगिनीभ्रात्रोर्भ्रातृपुत्रीपितृव्ययोः। विवाहे द्व्यादिभूतत्वाच्छाखाभेदोऽवगम्यते।"

यदपि वशिष्ठेनोक्तम्—"पञ्चमीं सप्तमीं चैव मातृतः पितृतस्तथा" इति। "त्रीनतीत्य मातृतः पञ्चातीत्य च पितृतः" इति च पैठीनसिना, तदप्यर्वाङ्निषेधार्थं न पुनस्तत्प्राप्त्यर्थमिति सर्व्वस्मृतीनामविरोधः।

एतच्च समानजातीये द्रष्टव्यम्। विजातीये तु विशेषः। यथाह शङ्खः—"एकजाताबहवः पृथक्क्षेत्राः पृथक्जनाः। एकपिण्डाः पृथक्शौचाः पिण्डस्त्वावर्त्तते त्रिषु"॥ एकस्मात् ब्राह्मणादेर्जाताः, एकजाताः। पृथक्क्षेत्राः भिन्नजातीयासु स्त्रीषु जाताः। पृथक्जनाः समानजातीयासु भिन्नासु स्त्रीषु जाताः। ते एकपिण्डाः सपिण्डाः किन्तु पृथक्शौचाः। पृथक्शौचमाशौचप्रकरणे वक्ष्यामः। "पिण्डस्त्वावर्त्तते त्रिषु" त्रिपुरुषमेव सापिण्ड्यमिति॥

7. While explaining the term non-*sapinda*, the *Sapinda* relationship is stated to be directly or mediately through connection with one body; but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the soul with its minute body, and so it would include persons that are not intended to be included; hence it is ordained—

"and is beyond the fifth and the seventh from the mother and from the father (respectively)."

The purport is, that *sapinda* relationship ceases beyond the fifth from the mother, *i. e.*, in the mother's line, and beyond the seventh from the father," *i. e.*, in the father's line; hence although the word *sapinda* by its etymological import applies to all relations, yet it is restricted in its signification like the word *pankaja* (the derivative meauing of which is "growing in the mud," but which by usage, means a lotus, being a species of its primary import), &c.: accordingly the six (ascendants) beginning with the father are *sapindas*, as also the six (descendants) beginning with the son, the man himself being the seventh; also in the case of divergence of the line, the counting shall be made until the seventh in descent (is reached) including him (*i. e.* ancestor within six degrees of ascent), from whom the line diverges (*i.e.* a collateral within the sixth degree of descent, from an ancestor within the sixth degree in ascent, is seventh); in this mode is the computation (of degrees) to be made everywhere (*i. e.* in all texts relating to degrees such as three, five or fourteen degrees). Accordingly, it is to be understood that the fifth from the mother is she who is (the fifth) in the line of descent from (any ancestor of the mother, up to) the fifth ancestor (and counting her and such ancestor, each as one degree)—in the computation—beginning with the mother (and counting her as one degree),—of the mother's father, paternal grandfather, and the like: similarly, the seventh from the father is she who is (the seventh) in the

line of descent from (any ancestor up to) the seventh ancestor (and counting her and such ancestor, each as one degree),—in the computation—beginning with the father (and counting him as one degree),—of the father's father, and the like. Accordingly (it is said)—"In marriage, two sisters, a sister and a brother, and a fraternal niece and a paternal uncle, are taken to be two branches by reason of the descent of the two from a common ancestor (from whom computation of the degrees is to be made among their descendants)."

As for what is said by Vasistha, namely —"May marry the fifth and the seventh from the mother and the father respectively,"—and by Paithínasi, namely,—"Beyond the third from the mother and the fifth from the father;" - these should be taken to intend the prohibition of the nearer degrees indicated therein, and not to allow the espousal of the nearer degrees expressed in them : thus is the conflict between all the Smritis avoided.

This again should be understood to be applicable to those of the same caste. But there is a different rule when the caste is different; thus Sankha ordains—"If there be many sprung from one (but) of separate soil, (or) of separate birth; they are, of one *pinda*, (but) of separate impurity, and the *pinda* exists in three."—'Sprung from one' means, sprung from the same Bráhmana or the like father; 'of separate soil,' means born of wives belonging to different castes; 'of separate birth,' means, born of different wives belonging to the same caste, 'they are of one *pinda*,' *i.e.*, *sapinda*; 'but of separate impurity,'—the separate impurity will be explained in the Chapter on Impurity; 'the *pinda* exists in three,' means, *sapinda* relationship extends to three degrees only."

८। किञ्च पिता पुत्रान्तरेष्वपि साधारणःमाता तु न साधारणीति प्रत्यासत्त्यतिशयात्,—"अनन्तरः सपिण्डाद्यस्तस्य तस्य धनं भवेत्"—इति वचनात् मातुरेव प्रथमं धनग्रहणं युक्तम्।

न च सपिण्डेष्वेव प्रत्यासत्तिर्नियामिका, अपि तु समानोदकादिष्वपि, अविशेषेण धनग्रहणे प्राप्ते प्रत्यासत्तिरेव नियामिका इति अस्मादेव वचनादवगम्यतइति ॥—मिताक्षरायां दायभागाध्याये ॥

8. But the father (of a person) is a common parent of other sons (by a different wife), but the mother is not so (of other sons by another husband); consequently by reason of her propinquity being greater (than that of the father), it is fit, that the mother alone should take the estate in the first instance conformably with the text (of Manu)—"*Whoever is the unremote from (among) sapinda, his property becomes his.*" (Text No. 4.)

Nor is propinquity the principle for determining the order of succession among only the *sapindas* (technically so called, in texts Nos. 1 and 2, namely, relations within seven degrees), but it is also (the principle for determining the order) among the *samánodakas* and the like; for, it appears from this very text (of Manu) that when succession is predicated of a body of persons without any distinction, then propinquity alone is the principle for determining the order of succession (among the individuals composing the body).—Mit., 2, 3, 3-4.

9. [The above text of Manu, does, according to the Mitákshará mean.,—'To the nearest relation, the inheritance next belongs,'—but its

wording literally means,—"Whoever is the unremote from (among) *sapinda*, his property becomes his."—This peculiar wording requires grammatical explanation, and accordingly the two commentators of the Mitákshará have made the following verbal comments on it :—]

"यः सपिण्डात् अनन्तरः" सन्निहितः "तस्य" सपिण्डसन्निहितस्य "धनं तस्य" सपिण्डसन्निहितस्य "धनं भवेत्" । विश्वेश्वरभट्टः ।

"Whoever is the unremote" *i. e*, nearest "from (among) the *sapinda* his" *i.e*, the nearest *sapinda's*, "property becomes his," *i. e.*, the nearest *sapinda's* "property."—Visvesvara Bhatta.

"सपिण्डात्" इति दूरान्तिकार्थैरिति षष्ठ्यर्थे पञ्चमी। तथाच, सपिण्डस्य "योऽनन्तरः" सन्निहितः "तस्य" सपिण्डस्य "धनं तस्य" सपिण्डसन्निहितस्य "धनं भवेत्" इत्यर्थः। बालम्भट्टः ।

The ablative case in the word 'from (among) the *sapinda*," is used in the genitive sense, agreeably to (the aphorism of Pánini the celebrated grammarian) दूरान्तिकार्थैः &c., accordingly, the meaning is,—"whoever is unremote," *i.e*, nearest "of the *sapinda*, his," *i.e.*, the *sapinda's* "property becomes his," *i.e.*, the nearest-of-the-*sapinda's* "property."—Bálambhatta.

[These are merely grammatical comments, but the rule intended to be laid down is what is clearly expressed in Colebrooke's lucid translation of the text, given above. The context of the Mitákshará, in which the above text of Manu is cited, shows beyond the shadow of a doubt that the word *sapinda* in that text is taken by the author of the Mitákshará in its etymological sense of any relation near or distant, as explained by himself (*supra* p. 52), and that the rule applies to heirs of all descriptions whether *sapindas* technically so called, or *samánodakas*, or *sagotras*, or *bandhus*. Hence the suggestion made by some writer that Visvesvara Bhatta and Bálambhatta mean to indicate by those comments that two persons must be *sapindas of each other* in order that they may inherit from each other,—is not only fanciful but simply absurd being founded as it is upon the erroneous assumption that one man can be *sapinda* of another man who is not *sapinda* to himself, which again is based upon another absurd assumption that the *sapinda* relationship of females for the purpose of marriage is applicable to their brothers, for which there is absolutely no authority.]

१० । पितरो यत्र पूज्यन्ते तत्र मातामहा ध्रुवम् ॥

10. Where the paternal ancestors are worshipped, there the maternal ancestors also should certainly be worshipped.

११ । अविभक्तधनास्त्वेते सपिण्डाः परिकीर्त्तिताः । ब्रह्मपुराणम् ।

11. But these whose property is undivided, are pronounced *sapindas*.—Brahma-Purána.

१२। सम्बन्धविवेके सुमन्तुः—"ब्राह्मणानाम् एकपिण्डस्वधानाम् आ-दशमाद्-धर्मविच्छित्तिर्भवति। आ-सप्तमाद्-रिक्थविच्छित्तिर्भवति। आ-तृतीयात् पिण्डविच्छित्तिः, अन्यथा पिण्डशौचक्रियाविच्छेदाद् ब्रह्म (हत्या?) तुल्यो भवति"॥

अस्यार्थमाह शूलपाणिः—जीवत्पित्रादित्रिकस्य वृद्धप्रपितामहादयस्त्रयः श्राद्धदेवतात्वात् पिण्डभाजो भवन्ति। तदूर्द्ध्वं त्रयो नवपुरुषपर्य्यन्ता लेपभाजः। श्राद्धकर्त्ता च दशम इति दशमाद् ऊर्द्ध्वं सापिण्ड्यनिवृत्तिः। दशमादित्यु-पलक्षणम्, तेन पितृपितामहजीवने नवपुरुषपर्य्यन्तं, पितृजीवने चाष्टपुरुष-पर्य्यन्तं सापिण्ड्यं ज्ञेयं। अपुत्रधनग्रहणे सन्निहिताभावे सप्तपुरुषपर्य्यन्तम् अधिकारः। धनग्राहिणम् आरभ्य तृतीयः पौत्रः, तदूर्द्ध्वं श्राद्धविच्छेदः। अन्यथा धनहारित्वे अपुत्रश्राद्धाद्यकरणे ब्रह्महत्या इत्यर्थः।

निर्णयसिन्धौ तृतीयपरिच्छेदे विवाहप्रकरणे सम्बन्धविवेकधृतसुमन्तु-वचनं शूलपाणिकृततद्व्याख्यासहितम् उद्धृतम्।

12. Sumantu—cited—in the Sambandha-viveka says,—

"Of Bráhmanas whose *pinda* (*i. e.*, oblation in the form of ball of rice) and *swadhá* (*i. e.*, food-offering to the *manes* of deceased ancestors) are common, the status of *sapinda*-ship ceases after the tenth (degree); heritable right by *sapinda*-ship ceases after the seventh degrees and (*sapinda*-ship for) offering *pinda* (*i. e.*, oblation of food in the exequial rites of a deceased person) ceases after the third degree: if, otherwise, there be cessation of offering of the *pinda*, and of performance of the purifying exequial rites, that would be equal to the murder of a Bráhmana.

Súlapáni explains the meaning of this (text thus),—

(If a deceased person's) three paternal ancestors viz., the father, the paternal grandfather and the paternal great-grandfather be alive, then the three remoter paternal ancestors viz., the great-great-grandfather and his father and paternal grandfather become, by reason of their being gods in the *sráddha* ceremony of the Ancestor-worship, partakers of the (three) *pindas* in the *sapindí-karana sráddha* ceremony of the deceased; and the three (remoter) ancestors after them up to the ninth degree become partakers of the lepa or remnants of the *pinda* oblations; and thus the person performing the Sráddha becomes the tenth, and hence *sapinda* relationship ceases after the tenth degree. It should be understood that the term—"after the tenth degree" is illustrative, therefore when (the two paternal ancestors viz.,) the father and the paternal grandfather are alive the *sapinda* relationship extends to *nine* degrees, and when the father (alone) is alive it extends to *eight* degrees. To the estate of a person

destitute of male issue the heritable right by *sapindaship* extends to *seven* degrees in default of nearer relations; counting from the first heir, his son's son is the third (in degree) and after him there is cessation of exequial *Sráddha* ceremony. "Otherwise &c." means, if a person inheriting the estate of a sonless deceased relation do not perform his *sráddha* and the like exequial ceremonies, he becomes guilty of murdering a Bráhmane. This is the meaning.

Cited in the chapter on marriage in the 3rd book of Nirnaya-Sindhu.

DEFINITIONS.

Da'ya.—There is a difference between the two schools with respect to the meaning of the term *dáya.* According to the Mitákshará, it is defined thus,—"The term *dáya* signifies that wealth which becomes the property of another, solely by reason of his relationship to the owner." Jímútaváhana, however, says that the word *dáya* by derivation means gift, but in the Law of Inheritance "The term *dáya* is by usage employed to signify wealth in which proprietary right dependent on relation to the former owner, arises *on the extinction of his ownership* by death natural or civil (such as degradation, renunciation of worldly objects, and retirement to a holy place for religious purpose).

This difference in the definition of the term *dáya* arises in consequence of the Mitákshará doctrine of the right by birth, of male issue in the property of the father and other paternal male ancestors in the male line. The Dáyabhága repudiates that doctrine. The Mitákshará therefore adds that *dáya* is of two sorts, namely, *a-pratibandha* or unobstructed, and *sa-pratibandha* or obstructed. According to the Dáyabhága, *dáya* is always *obstructed,* inasmuch as the right does not accrue during the lifetime of the previous owner in any case.

Having regard to the definition of the term *dáya,* as given in the Mitákshará, it cannot be rendered into *heritage* which signifies only what is called *obstructed dáya,* and cannot include the *unobstructed dáya* or the congenital coparceny of the male issue; for, *nemo est hæres viventis.*

Partition.—According to the Mitákshará,—"Partition is the adjustment into specified portions, of divers rights (of the coparceners) which (divers rights) extend to the whole estate." According to the Dáyabhága,—"Partition is the manifesting or making known, by the casting of lots or otherwise, the

proprietary right (of each coparcener), which had arisen in the land and moveables, but which extended only to a fractional portion of the same, that was previously unascertained, and was unfit for exclusive dealing by reason of there being no evidence of any ground of discrimination."

According to the Mitákshará, the right of each coparcener extends to the whole property; but according to the Dáyabhága, it extends to a fractional portion only, or to that portion only which on partition is allotted to him; or in other words, coparceners take as *joint tenants* under the Mitákshará, but as *tenants in common* under the Dáyabhága.

Sapinda.—The term *sapinda* means one *of the same pinda*. The word *pinda* is used in various senses; it signifies thickness, mass, corridor of a house, a ball, food, body which is but assimilated food; and food for departed ancestors, such as a ball composed of rice, &c., presented to the *manes* of ancestors at the Sráddha ceremony.

In the Hindu law books the term has been used in two different senses: in the one sense, it means a relation connected through the same body; and in the other, it means a relation connected through funeral oblations of food.

According to the Mitakshara.—In the Mitákshará the term *sapinda* is used in the sense of, one *of the same body*, *i. e.*, a blood relation. In this literal sense the term would include all relations however distant. But this derivative denotation of the term, is curtailed by technical limitations; and so it includes relations within the seventh degree according to the Hindu mode of computation. Then again there is this further restriction that this term when used without qualification, signifies agnatic relations only, *i. e.*, the relations of the same *gotra*, the relations of a different *gotra* being included under the term *bandhu* in the Mitákshará,—Text No. 2 cited in Mit., 2, 5, 6.

According to the Mitákshará, therefore, the *sapindas* of a person are, his six male descendants in the male line, six male ascendants in the male line, and six male descendants in the collateral male line of each of the six male ascendants,—altogether forty-eight relations. (See table *infra* p. 66).

The lawfully wedded wives of these relations as well as of the person himself are his *sapindas*. The sacrament of marriage effects physical unity of husband and wife. Text No. 6; D.B., 4,2,14.

As regards the Sapinda relationship of females with males, for the purpose of marriage, it extends to different degrees on the paternal and the maternal sides of the males, according

to most of the sages. The sages again are not agreed as to the number of degrees, to which the Sapinda relationship of females extends: according to different sages, the number of degrees is either 8 or 7 or 6 on the paternal side, and respectively 6 or 5 or 4 on the maternal side, of the bridegroom, which constitutes females within those degrees, his *sapindas* for the purpose of marriage, and therefore prohibited.

It should be specially noticed that this connubial *sapinda* relationship is one between males and females only. It does not affect the *sapinda* relationship between males. There is absolutely no authority for its application to males. But an *obiter dictum* is expressed in two cases, which seems to be based on the suggestion made by a writer as to the intention of the two commentators of the Mitákshará, in the passages (Text No. 9, p. 56 *supra*) explaining Manu's text. This question will be considered while dealing with the meaning of the term *Bandhu*.

Computation of degrees.—The Hindu mode of computation of degrees is the same as that adopted by the Canonists and is different from the English or Civilian mode which is adopted in the Succession Act, Sections 21 and 22, and according to which you are to exclude the *propositus*, and count as one degree each ancestor and each descendant lineal or collateral, down to the relation whose degrees of distance from the *propositus* you are computing. According to the Hindu or Canonist mode which is also called the classificatory mode, you are to count the *propositus* as one degree, and then count his as many ancestors as will make up the given number, taking each ancestor as one degree, and then count as many descendants of the *propositus* himself, and of each of the said ancestors, as together with the *propositus* or that ancestor respectively, will make up the given number. In the above enumeration of the male *sapindas* according to the Mitákshará, you have an instance of relations within seven degrees; and in the enumeration given below, of the first class Dáyabhága *sapindas*, you have an instance of relations within four degrees.

In this connection, I should draw your attention to a Madras decision (I. L. R., 7 M., 548), in which it has been held that a person's maternal grandfather's brother's daughter's daughter is beyond five degrees and therefore eligible for marriage according to the Mitákshará. It is difficult to understand how she could be held to be beyond five degrees except according to the English mode of computation of degrees. The Hindu judge who was a party to that decision appears to have been

"a lawyer without Sanskrit"; otherwise the error would not have crept into the judgment.

Sapindas according to the Dayabhaga.—The above definition of *sapinda* is not altogether lost sight of, in the Dáyabhága. But the author of that treatise explains it to relate to marriage, mourning, &c., and not to inheritance. For the purpose of inheritance, he takes the word *sapinda* in the sense of one connected through the same funeral oblation.

According to the Dáyabhága as understood by the Full Bench in the case of *Guru Gobinda Shaha Mandal*, 5 B.L.R., 15 = 13 W.R., F.B., 49, the term *sapinda* includes three classes of relations.

The first class includes those relations of a person with whom that person, when deceased, and after the *sapindi-karana* ceremony, partakes of undivided oblations. They are his three male descendants in the male line, three male ascendants in the male line, and three male descendants in the male line, of each of the three male ascendants: or in other words, the son, grandson and great-grandson; the father, grandfather and great-grandfather; the brother, brother's son and brother's grandson; the paternal uncle, his son and grandson; as well as the paternal granduncle, his son and grandson;—altogether fifteen relations. The lawfully wedded wives of these relations as well as of the person himself are his *sapindas* in this sense. It is worthy of remark that the Hindus living in joint families could not conceive an idea of heaven without joint family, the first class *sapindas* are in fact the members of the joint family, associated together in heaven after death. (See table *infra* p. 65).

The second class comprises those relations of a person, that present oblations participated in by that person, when deceased, but do not partake of undivided oblations with him. They are the grandsons by daughter, of the person himself, of his three paternal ancestors, as well as of the son and the grandson of the person himself and his three paternal ancestors,—altogether twelve relations. (See table *infra* p. 65).

The third class comprehends the three maternal grandsires, to whom the deceased was bound to offer oblations, and those relations that present oblations to them. They are the three maternal grandfathers, three male descendants of each of them, and the grandsons by daughter, of the three grandsires, and of two male descendants of each of the three grandsires,—altogether twenty-one relations. (See table *infra* p. 66).

You will yourself be in a position to draw out the list of relations falling under each class mentioned above, if you bear in mind the following propositions in connection with the *Párvana Sráddha* ceremony, namely: (1) A person is bound to offer funeral cakes to his three immediate *sagotra* ancestors male as well as female, and to his three immediate maternal male grandsires. (2) A person after his death, and after the *sapindí-karana* ceremony partakes of undivided oblations with his three *sagotra* male ancestors with whom he is united by that ceremony. The *sapindas* of a person are (according to the Full Bench) those relations with whom he partakes of undivided oblations, those who offer oblations enjoyed by him, those to whom he was bound to present oblations, as well as those who offer oblations to those to whom he was bound to present oblations.

In connection with this subject it ought to be particularly borne in mind that if a person die during the lifetime of one or two of his three immediate *sagotra* ancestors, then his *sapindí-karana* ceremony which must be performed with three *sagotra* ancestors, is to be performed by uniting him with two or one respectively of his paternal ancestors further removed than three degrees. Thus, most, if not all, of the *sakulyas* may come under the first class of *sapindas*: See Text No. 12.

According to all the Sanskrit commentators, the term *sapinda* in the sense of connected through funeral oblations, includes the first class only: of these also, the three ancestors and the three descendants in the male line, only, are *sapindas* in this sense, the rest are not so except in a secondary sense. And it is extremely doubtful whether the author of the Dáyabhága intended to apply the term to all the relations of the latter two classes: Srikrishna the commentator of the Dáyabhága and author of the Dáyakrama-Sangraha, however, refuses to call them *sapindas*.

Points not placed before the Full Bench.—The exposition of Sapinda relationship according to the Dáyabhága, set forth above, was made by the Full Bench as being what is logically deducible from the general expressions used by the author in the course of his arguments founded on the doctrine of spiritual benefit, whereby he maintained the particular *order of succession* of certain relations, as laid down by him, differing from the author of the Mitákshará.

There were however certain difficulties against his *oblation theory*, which stood in the way of the logical deduction of the principle of spiritual benefit from the generality of the

expressions, of which the author was fully conscious but which were neither argued at the bar nor considered by the Full Bench while enunciating what appeared to follow logically from the author's arguments in particular instances, as legitimate generalisations with respect to Sapinda relationship. The difficulties are these, -

1. The *oblation theory* is founded solely on two texts, one of Baudháyana, and the other, of Manu: (Texts nos. 3 and 4 pp. 50-51 *supra*). Baudháyana's text cannot be construed to support the theory unless the word *dáya* mean *pinda*. There is no authority in support of this novel meaning sought to be put upon it by Jímútaváhana; for, the plain natural meaning of the important passage is—"All these participating in *undivided heritage* are pronounced *sapindas*; those who participate in *divided heritage* are called *sakulyas*."

2. The author's interpretation is,—"All these partaking of *undivided oblations* are pronounced *sapindas*. Those who partake of *divided oblations* are called *sakulyas*."

Oblations may be said to be *undivided*, only on the occasion of performing the *sapindi-karana* ceremony on the first lunar anniversary of the day of a person's death, when four *pindas* are made, one for the deceased, and three for his three paternal ancestors, and the *pindas* are mixed up, thereby indicating that the soul of the deceased is to pass from the *preta-loka* or the region for the dead (purgatory), to the *pitri-loka* or region for the spirits of ancestors or heaven. But the oblations presented while the Párvana Sráddhas, the foundation of the doctrine of spiritual benefit, are performed, are separate and divided and cannot be called *undivided*.

It is difficult to understand the meaning of the term *divided oblations*, whereby must be understood the *Pinda-lepas* or remnants of the *pindas i. e.* what are attached to the hand while mixing up the things, of which the *pindas* are composed, and scraped by the Kusa grass and formed into an offering for the three remoter ancestors. There is no reason why these should be called *divided oblations*, and why the three oblations presented to the three nearer ancestors, one to each, should be called *undivided oblations*.

3. According to the text of Manu (Text No. 4, p. 51 *supra*) oblations are to be presented to three ancestors, and not to six; there cannot be any doubt that Manu provides for the offering of *pindas* to the three paternal ancestors only, and not to the three maternal ancestors also.

And this is consistent with the provision that "the *fourth* is the giver of these offerings; the *fifth* has no concern with them." The terms *fourth* and *fifth* are used relatively to the remotest of the three ancestors. Hence it is clear that Manu cannot be taken to contemplate the offering of oblations by a person to his maternal grandfather, great-grandfather and great-great-grandfather; for, that person is undoubtedly *fifth* relatively to the remotest of the three maternal ancestors.

4. The Ancestor-worship like the worship of the Gods, is performed for the benefit of the worshipper and not for the benefit of the ancestors.

5. The doctrine of spiritual benefit derived from the performance of any Sráddha ceremony by a son or the like, is contrary to the doctrine of *Karma* and *Adrishta*, one of the fundamental principles of the Hindu religion, according to which a man's condition of happiness or misery depends solely on his own acts and omissions.

As to other objections against the doctrine of spiritual benefit derived from oblations, see Preface to the second Edition of the Dáyatattwa.

Jímútaváhana was well aware of the weakness of his position, and did therefore conclude by saying that if the learned are not satisfied with his *principle*, still the *order of succession* maintained by him should be accepted: D. B., Ch. xi, Sect. vi, Para. 33.

So it is the *order* and not the *principle*, which is of higher importance, according to the author himself. Hence the principle enunciated by the Full Bench does not appear to be justified.

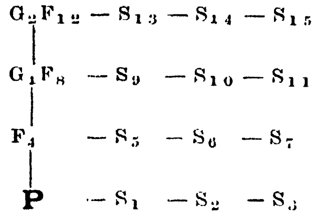
Sakulya.—The term *sakulya* means one belonging to the same *kula* or family, and designates two groups of heirs according to the Dáyabhága. The first group of *sakulyas* of a person comprises the 4th, 5th and 6th male descendants in the male line of that person, and of his father, grandfather and great-grandfather; and it includes the 4th, 5th and 6th paternal male ancestors in the male line, and also six male descendants in the male line of each of these ancestors; altogether thirty-three relations. The term *sakulya* therefore includes those male *sapindas* according to the Mitákshará, that do not fall under the first class Dáyabhága *sapindas* as enumerated above. The term *sakulya* is not used in the Mitákshará for denoting any class of heirs.

Besides the above meaning, the author of the Dáyabhága puts upon the term *sakulya* as used in Manu's text (No. 4.)

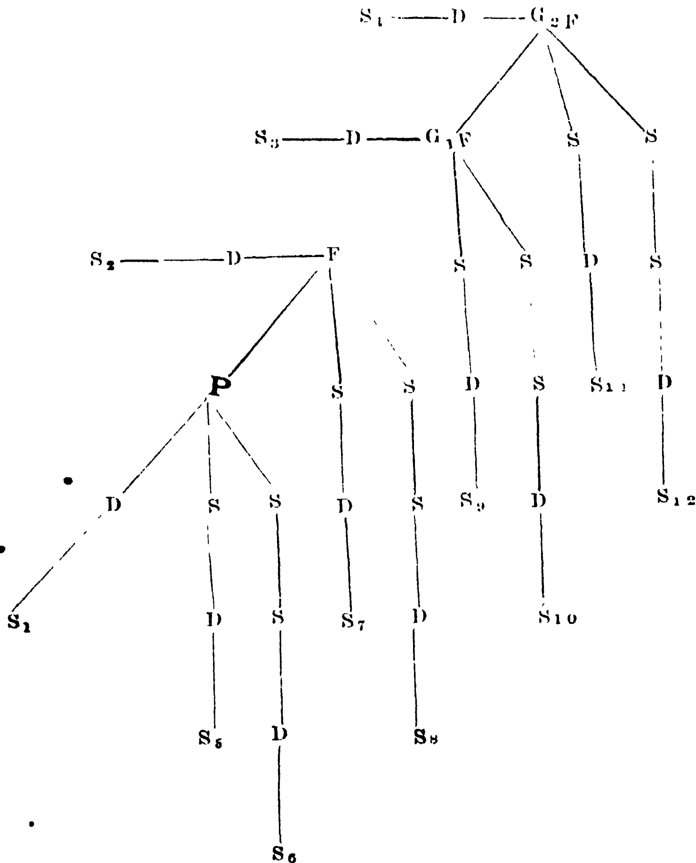
another sense in which it includes the group of heirs also called *samánodakas.*

The following tables will help you in understanding the *sapinda* and the *sakulya* relationships.

The first class *Dáyabhága sapindas.*



The second class *Dáyabhága sapindas.*



The third class *Dáyabhága sapindas.*

S_{15} — D — G_3F_{11}

S_{10} — D — G_2F_6 S_{12} — D — S_{20}

S_{13} — D — S_{21}

S_5 — D — G_1F_1 S_7 — D — S_{18}

S_{14}

S_8 — D — S_{19}

M S_2 — D — S_{16}

S_9

P S_3 — D — S_{17}

S_4

The *Mitáksharú sapindas.*

G_5F_{19}—S_{20}—S_{21}—S_{15}—S_{16}—S_{47}—S_{48}

G_4F_{16}—S_{17}—S_{18}—S_{41}—S_{42}—S_{43}—S_{44}

G_3F_{13}—S_{14}—S_{15}—S_{37}—S_{38}—S_{39}—S_{40}

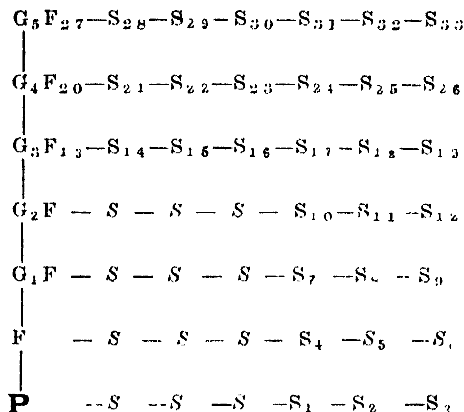
G_2F_{10}—S_{11}—S_{12}—S_{33}—S_{34}—S_{35}—S_{36}

G_1F_7 — S_8 — S_9 — S_{29}—S_{30}—S_{31}—S_{32}

F_4 — S_5 — S_6 — S_{25}—S_{26}—S_{27}—S_{28}

P — S_1 — S_2 — S_3 —S_{22}—S_{23}—S_{24}

The first group of *Sakulyas.*



Samanodakas.—The term *samánodaka* includes all agnatic relations of the same *gotra* or family, within fourteen degrees calculated according to the Hindu mode of computation ; that is to, say, thirteen male descendants in the male line, thirteen similar ascendants, and thirteen similar descendants of each of these thirteen ascendants, excepting, however, those included under the terms *sapinda* and the first group of *sakulya.* According to some, it comprises all such *sagotras* or agnatic relations whose common descent and name are remembered. The meaning of the term *samánodaka* is the same as *sagotra,* in the Mitákshará : but in the Dáyabhága, it is limited as mentioned above.

Sagotras.—Two persons are *sagotra,* or of the same family, if both of them are descended in the male line from the *rishi* or sage, after whose name the *gotra* or family is called, however distant either of them may be from the common ancestor. Every Hindu knows the *gotra* to which he belongs.

The later Bráhmana writers say, that properly speaking Bráhmanas alone belong to some *gotra* or other, as being descended from the *rishi* who is the founder of the *gotra* or family ; but the three inferior tribes have no *gotra* of their own, their *gotra* being that of their Guru (preceptor of the Vedas) or priest. But this theory seems to be opposed to admitted facts. For Visvámitra, who was a Kshatriya by birth, and Vasishtha who was not a pure Bráhmana by birth, are admittedly founders of *gotras,* or ancestors of many founders of *gotras.*

Thus a text of Smriti cited by Raghunandana says :—

जमदग्नि-भरद्वाजौ विश्वामित्रात्रि-गौतमाः ।
वशिष्ठ-कश्यपागस्त्या-मुनयो-गोत्रकारिणः ।
एतेषां यान्यपत्यानि तानि गोत्राणि मन्यते ॥

Which means,—"The sages—Jamadagni, Bharadvája, Visvámitra, Atri, Gotama, Vasishtha, Kásyapa, and Agastya—were progenitors of *gotras* : those that were descendants of these, are known to be the *gotras* or founders of *gotras*."

The fact that persons of different castes have the same *gotras*, rather proves that the caste system itself is a later institution or classification based upon occupations and qualifications,—a theory supported by many Sanskrit works of authority.

The samana-pravaras are descendants in the male line of the three paternal ancestors of the founder of a *gotra*. The term is used in the Dáyabhága, but not in the Mitákshará. Raghunandana cites the explanation given by Mádhava-A'cháryya of the term *pravara*, thus, प्रवरस्तु गोत्रप्रवर्त्तकस्य मुने-र्व्यावर्त्तको-मुनि-गणः, इति माधवाचार्य्यः ।—which means "Mádhava-A'cháryya says, that *pravara* is the group of sages distinguishing the sage who is the founder of a *gotra*." It seems that two different *gotras* may have the same name, and they are distinguished from each other by their *pravaras*, which term may also mean the most distinguished members of a *gotra*.

BANDHUS.

Bandhu.—The term *bandhu* is used in the Mitákshará, and not in the Dáyabhága, to designate a class of heirs ; and according to the Mitákshará, it means and includes, as I have already said, the *bhinna-gotra sapindas* or relations belonging to a different family. The meaning of the term *sapinda* is explained in the Mitákshará while commenting on the slokas of Yájnavalkya's Institutes, in which the qualifications of the damsel to be married by a man are dealt with. It is declared that the intended bride must, amongst others, be non-*sapinda*, must not belong to the same *gotra* or *pravara*, and must be beyond the fifth and the seventh degree from the mother and the father respectively : Texts Nos. 5, 6 & 7, *supra* pp. 51-55.

Meaning of Sapinda in Mitakshara.—In explaining the term non-*sapinda*, the Mitákshará says that the word *sapinda* means

one connected through the same body *i. e.*, any blood-relation however distant. It is observed that the husband and the *Patní* or lawfully wedded wife become *sapindas* to each other in this sense, because a text of revelation says that the sacrament of marriage unites them "bones with bones, flesh with flesh, and skin with skin." It is erroneous to say that they become *sapindas* through their child; for, if that were so, they should not be *sapindas* before childbirth, whereas the true theory is, that they become *sapindas* from the moment of their marriage.

After giving the above exposition, the Mitákshará says that wherever the word *sapinda* is used in that work, it should be understood in the sense of a blood-relation: Text No. 6, *supra* pp. 52-53.

The Mitákshará then goes on to observe that the qualification non-*sapinda* applies to all castes, but the qualification of not belonging to the same *gotra* or *pravara* applies to the regenerate classes only.

Sapinda relationship for Marriage. -It is next observed that in explaining the word non-*sapinda* it has been said that *sapinda* relationship means immediate or mediate connection through same body, but as such connection may be taken to exist between all persons, marriage itself would be impossible; hence, Yájnavalkya has declared that if the bride be "beyond the fifth and the seventh degree from the mother and the father respectively, she may be espoused." The Mitákshará adds that *sapinda* relationship should be taken to cease beyond those degrees, evidently meaning, for the purpose of marriage; because, this conclusion is arrived at as the proper construction of the text No. 5, which prohibits marriage of a *sapinda* damsel, but permits marriage of one if beyond five and seven degrees from the mother and the father respectively, though she be included under the term *sapinda* according to its ordinary meaning,— this conflict being reconciled by restricting in that way the meaning of the term Sapinda *in this text* of Yájnavalkya: and then explains the mode of computation of degrees (which I have already explained), and goes on to observe that the same mode should be adopted everywhere (*i. e.*, in all cases of contemplated marriage, or in all texts relating to degrees).

It should, however, be specially noted that the Mitákshará does not say whether or not, the lines of the seven and the five ancestors of the *propositus* on the paternal and the maternal sides respectively, may pass through males or females or both indifferently, although it is admitted on all sides that the lines of descent

from those ancestors may pass through males or females or both, without any distinction. But in illustrating the mode of computing the degrees, the Mitákshará refers only to the lines of the father's and the mother's male ancestors in the male line, though in computing five degrees the mother is counted as one.

Conflicting texts noticed.—The Mitákshará then cites a text of Vasishtha which says: "The fifth or the seventh from the mother and the father respectively (may be married),"—and a text of Paithínasi, which says: "(A girl may be taken in marriage, who is) beyond the third from the mother and the fifth from the father;"—and explains these texts away by saying that they do not intend to authorize marriage of girls distant by lesser number of degrees (given in these texts) than in the above sloka of Yájnavalkya, but they intend to prohibit the espousal of the girls of nearer degrees indicated in them.

Reconciliation unsatisfactory.—The above mode of reconciliation, adopted by the Mitákshará does not appear to be satisfactory at all, nor is the view put forward by that treatise, respected and followed in practice. The customs and usages relating to the prohibited degrees for marriage, are so divergent in different localities, and among different tribes and castes, that it may be safely affirmed that as regards marriage, the written texts of law found in the Smritis and the Commentaries are nowhere followed in practice.

Conflicting rules on prohibited degrees.—If prohibited degrees for marriage be taken, as the standard of *sapinda* relationship, then it would extend to eight degrees on both the mother's and the father's side, according to Manu: to five and seven degrees (calculated from the mother and the father) respectively on the mother's and the father's side, according to Yájnavalkya: to four and six degrees respectively on the mother's and the father's side, according to Vasishtha; and to three and five degrees respectively on the mother's and the father's side, according to Paithínasi; and to still lower degrees on the two sides according to the Vedic texts (*infra* p. 82) and according to custom prevailing in many places and among many classes of people.

It should be remarked that as damsels belonging to the same *gotra* are separately prohibited to the regenerate tribes for marriage, the *sapinda* girls on the father's side, who need be considered for the purpose of marriage among these tribes, are those that are cognate to the bridegroom, that is to say, between whom and the bridegroom females intervene. But as regards the Súdras who form the majority of Hindus, both

the agnate and the cognate *sapinda* damsels should be taken into consideration in this connection; for, they only are prohibited to the Súdras.

As regards the regenerate tribes the only rule of prohibited degrees for marriage, which seems to be followed in all parts of India, is that a damsel of the same *gotra* with the bridegroom is not taken in marriage.

Marriage usages, contrary to Sa'stras.—But it should be specially noticed that as regards prohibited degrees outside the *gotra*, that is to say, girls who are *bhinna-gotra sapindas*, or relations belonging to a different family, the usages are most divergent. We have already seen that the *Rishis* or lawgivers propound different rules on the subject. If we now turn to the actual practice observed by the people, we find that even amongst the Bráhmanas of Madras the *bhinna-gotra sapinda* relationship for marriage, extends only to two degrees from the mother: because, there they marry even their father's sister's daughter and their mother's brother's daughter. So also among the Chhatris or Rájputs claiming to be Kshatriyas, domiciled in Bengal and Chhota-Nagpur, very few cognate girls are eschewed for marriage. The reason appears to be, that when in a particular locality there are only a few families belonging to the same caste, so that the observance of the prohibited degrees as propounded in the Sástras would render marriage itself impracticable for want of lawfully eligible brides, then we find a departure from the Sástras, to a greater or lesser extent, according to the exigency. The prohibited degrees are not observed also by the Kulin Bráhmanas of Bengal, whose so-called high position depends only on marriage of girls of certain families according to the modern and artificial rules of *Kulinism*, and who are often found to contract what may be called incestuous marriages for maintaining their *Kulinism* by disregarding the rules propounded by the Sástras, and explained by Raghunandana whose authority is respected in Bengal.

The golden rule of prohibited degrees—for marriage, to follow, therefore, in a case where the validity of a marriage is called into question on the ground of being within prohibited degrees, is, to pronounce it valid if found to be celebrated in the presence, and with the presumed assent of the relations and caste people, notwithstanding written texts of law to the contrary, which must be taken to be recommendatory in character, as appears from the language of Manu's text on the subject:—

असपिण्डा च या मातु-रसगोत्रा च या पितुः ।
सा प्रशस्ता द्विजातीनां दारकर्म्मणि मैथुने ॥

Which means,—"She, who is non-*sapinda* also (non-*sagotra*) of the mother, and non-*sagotra* also (non-*sapinda*) of the father, is *commended* for the nuptial rite and holy union among the twice-born classes." Similarly, the Mitákshará expressly says that many of the qualifications of the bride, ordained by Yájnavalkya (Text No. 5, p. 51, *supra*) are directory only.

Prohibited degrees are not Bandhus for inheritance.—Thus you see, the prohibited degrees for marriage can by no means be taken to be *bhinna-gotra sapindas* or *bandhus* for the purpose of inheritance, on account of the following reasons .—

(1) While explaining *sapinda* relationship for the purposes of marriage, the Mitákshará says that wherever in that work the word *sapinda* is used, it shall be taken in the sense of one connected through the same body ; but it does not say that the restriction of *sapinda* relationship within seven degrees on the father's side and five degrees on the mother's side, which is undoubtedly laid down by Yájnavalkya for the purpose of marriage, is to be understood as applicable for all purposes :

(2) If the intention of the Mitákshará had been to apply the said restriction to inheritance and other purposes as well, it would not have explained the degrees of *sapinda* relationship again, while dealing with the *Párvana Sráddha*, and with Inheritance, by citing the text of Vrihat-Manu (Text No. 2), but would have referred to the earlier explanation of it given for marriage : Mit.,2, 5, 6 :

(3) The principles upon which marriage is prohibited between certain relations, are not the same on which inheritance is based :

(4) *Sapinda* relationship for marriage has reference only to *female* relations of the intended bridegroom, whereas *sapinda* relationship for inheritance relates mainly to male relations ; females, as a general rule, being excluded from inheritance :

(5) The proposition that if A can marry B's sister, then B cannot be A's heir, is not correct ; for a Bráhmana of Madras can marry his maternal uncle's daughter whose brother is expressly recognised as an heir, and Súdras can marry within the same *gotra*, a girl whose brother is a *samánodaka* and as such an heir :

(6) *Sapinda* relationship for marriage not being uniform but

divergent, as shown above, cannot be the basis of a rule of inheritance, which must be invariable, certain and uniform :

(7) There is neither authority nor reason for excluding a *bhinna-gotra* relation from inheritance when his relationship can be traced, seeing that the Mitákshará says that *bhinna-gotra sapindas* are included under the term *bandhus* declared heirs after *sagotras*, and that the term *sapinda* means any relation ; and seeing further that when the estate of a Bráhmana goes to his caste-people in default of *bandhus*, a very strong presumption arises against cutting down and confining the meaning of the term to some relations only, with a view to exclude others :

(8) These arguments and considerations for the purpose of establishing that the *prohibited degrees* for marriage are not *bandhus* for inheritance, would appear unnecessary and superfluous to a careful reader of the exposition given in the Mitákshará, of the *sapinda* relationship for marriage (Text No. 7, pages 53-55 *supra*) ; because, the Mitákshará distinctly says that the seven degrees on the father's side and the five degrees on the mother's side are to be computed from the *father* and the *mother* respectively : hence the six descendants of the father's seventh ancestor who is eighth from the *propositus* (in the Hindu mode of computation) are *sapindas* for marriage. But the eighth ancestor's descendants are admittedly not *sapindas* for inheritance ; for, the Mitákshará has explained *sapinda* relation for inheritance to extend to seven degrees from the *propositus*, and not from his father. This conclusively shows that the Sapinda relationship for marriage is inapplicable to inheritance.

Meaning of the word Bandhu.– Having regard to the structure and organisation of Hindu society founded upon the caste system, it appears that the Hindus have special reasons for attachment to even their most distant relations as well as to their caste-people. A well-known sloka says :—

उत्सवे व्यसने चैव दुर्भिक्षे राष्ट्रविप्लवे ।
राजद्वारे श्मशाने च य-स्तिष्ठति स बान्धवः ॥

Which means,—"He who stands by you, on the occasions of joy and distress, at a time of famine or of political revolution, and in the King's Court as well as in the cremation ground, is your *Bándhava* or relation."

Thus the agnate *sapindas* are *bandhus* or relations *par excellence*, and in this sense the word has been used in the text of

Vishnu, dealing with inheritance: see original text No. 2 under Mitákshará Succession. I should tell you that the words *bandhu* and *bándhava* are both derived from the root *bandh* = bind, and means any relation agnate or cognate. In Manu, Ch. ix, Slokas 159 and 160, the word *bandhu* has been used in the sense of *sagotra* or member of the same *gotra*: see original text No. 12 under Adoption. In the text of Yájnavalkya (ii, 135) dealing with the order of succession, the word *bandhu* has been used in the sense of a cognate, the agnates being denoted by the term *gotrajas*; hence, it means cognates in the Mitákshará. But in many texts of the Smriti the term appears to be used in the sense of *sapinda* or *sagotra* or in the wider sense of a *relation*.

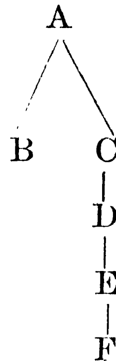
Conclusion as to who are Bandhus.—The conclusion, therefore, which appears to legitimately follow from the foregoing considerations, is, that the word *bandhu* in the Mitákshará means and includes either all cognate relations without any restriction, or at any rate, all cognates within seven degrees on both the father's as well as on the mother's side. This view, however, is opposed to an *obiter dictum* thrown out for the first time in the Full Bench case of *Umaid Bahadur* v. *Uday Chand*, I.L.R., 6 C., 119=6 C.L.R., 500, and repeated in the case of *Babu Lal* v. *Nanku Ram*, I. L. R., 22 C., 339.

Obiter dictum on Bandhus.—It is held by the Full Bench that a person's sister's daughter's son is his *bandhu* and heir, but it is added that his sister's daughter's son's son would not be his *bandhu* and heir. The question for consideration by the Full Bench was whether the sister's daughter's son is an heir; but whether his son also is an heir, was not a matter for consideration by the Court in that case. The word *sapinda* was erroneously rendered into "kinsmen connected by funeral oblations of food," by Colebrooke in his version of the Mitákshará. This error was exposed by two learned oriental scholars, West and Bühler the former of whom was an eminent judge, in their valuable Digest of Hindu law, by giving a translation of portions of the passages of the Mitákshará, dealing with marriage, where the meaning of the term *sapinda*, and *sapinda* relationship for marriage, have been explained. The correct view was adopted in the case of *Lallubhai Bapubhai* v. *Mankuver Bhai*, I.L.R., 2 B., 422. The Calcutta Full Bench in their judgment in the above case followed this Bombay decision on that point, and then made the following observations:—

"The next question for consideration is, whether the defendant in the case that has been referred to us, stands in such a

relation to Mooktar Bahadur (the *propositus*) that they are each other's *sapindas* as defined by the author of Mitákshará in A'chára-Kánda."

Then proceeding to explain what is intended by the above passage, the facts of the case relating to relationship, are referred to, and then, the following table is given for illustration, and the same is elucidated as follows :—



"A is the common ancestor ; B, his son, is the *propositus* ; C, a daughter of A ; D, her daughter, both dead ; E is the son of D, and has a son F.

"Now B and E are *sapindas* to each other, but not B and F. Although F is witnin six degrees from the common ancestor, yet B, not being a descendant of the line of the maternal grandfather, either of F or of his father and mother, they are not *sapindas* to each other ; but B being a *sapinda* of E through his mother, they are *sapindas* of each other."

Dictum inexplicable.— I have not been able to find out anything in the A'chára-Kánda, in support of the above view : in fact, there is nothing anywhere in the Mitákshará which may justify the foregoing *dictum*. On the contrary, B being a relation on F's father's side and being within seven degrees, is a *sapinda* of F the circumstance of two females intervening cannot make any difference ; for, F is admittedly a *sapinda*, and E 's not only a *sapinda* but also heir, of B. Bearing in mind that the word *sapinda* means a *relation* according to the Mitákshará, it is difficult to conceive any case in which A is B's *sapinda* and at the same time B is not A's *sapinda* : it seems to be opposed to common sense. This somewhat anomalous view appears to be due to the misapprehension of the meaning of the comments made by Visvesvara Bhatta and Bálambhatta on the text of Manu (see *supra*, Texts Nos. 4 and 9, pp. 51 & 55-6), as appears from the later judgment referred to above.

Neither Visvesvara Bhatta nor Bálambhatta has said anything which may justify the inference of the rule sought to be deduced from their verbal comments on Manu's text,—"To the nearest Sapinda, the inheritance next belongs",- which, according to the Mitákshará means,—"To the nearest *relation*, the inheritance next belongs." The Mitákshará takes the word

"*sapinda*" in this text of Manu, in its primary sense, namely, *relation*, whether *sapinda* technically so called, or *samánodaka*, or *sagotra*, or *bandhu*. The text is construed to lay down the rule of propinquity as the principle governing the order of succession among the said groups of heirs; see Text No. 8, p. 55 *supra*.

It is impossible to suppose that the commentators who profess to elucidate the Mitákshará, entirely ignored the interpretation put by its author on that text, and made comments on it, for the purpose of indicating, without expressing, a novel construction limiting its operation to the technically called *sapindas* alone, to be discovered by the Tagore Law Professor of 1880 (p. 569). If the word *sapinda* in that text means *any relation*, as is maintained by the author of the Mitákshará, how could the comments of Visvesvara and Bálambhatta, which are undoubtedly verbal in character, be taken to imply a rule of exclusion, upon the assumption that the term *sapinda* is used by them in the technically limited sense, when the author of the Mitákshará takes that term in its widest etymological sense, and when the commentators do not express dissent from the author's interpretation. And even if the commentators had differed from the author, though they in reality did not, how could their view be accepted while opposed to that of the author. The two commentators merely explain the meaning of the individual words of Manu's text, in a mode well-known to Sanskrit scholars, which is not the mode adopted for *construction of sentences*, as distinguished from *definition* or grammatical interpretation of the words composing sentences.

The aforesaid *obiter dictum* in *Umaid Bahadur's* case can be maintained, if the exposition by the comparatively recent commentators, of the prohibited degrees for marriage, be assumed as if given by the Mitákshará itself; and if it be further assumed, that in order that A a cognate may be heir of B as his *bandhu*, it is necessary that their relationship must be such, that A may marry B's sister, and also B may marry A's sister according to the said exposition of prohibited degrees.

The learned Hindu Judge who delivered the judgment of the Full Bench, seems to have consulted the said Tagore Professor, and embodied in it the Professor's own novel view which is unsupported by any authority, and is clearly erroneous as it is not justified by anything said by the two commentators of the Mitákshará, who never dreamt what is sought to be deduced from their language.

It has already been observed that, while explaining the mode of computing the five and the seven degrees from the mother and the father respectively, the Mitákshará does not say anything about the lines passing through males only, or through both males and females without any distinction. It is, however, clear that in counting five degrees from the mother, she is computed by the author as one degree, thus indicating that although each link is called a *purusha* which means a generation, but which also means a male, still that word is not to be taken to imply exclusion of females: thus when the Mitákshará does not lay down any restriction, it may be taken that according to that treatise the lines may pass through both males and females, or either.

But the recent commentators confine the upward lines to male ancestors only, although the downward lines according to them, may pass through males and females, or either; and although the upward lines of the five and the seven ancestors from the mother's and the father's *bandhus*, are computed by them by taking the female ancestor as one degree. No reason is assigned by them for this distinction.

The reason which induced the recent commentators to construe the texts permitting marriage beyond five and seven degrees from the mother and father respectively, as meaning the exclusion of the female descendants of only the six and the four *male* ancestors of the father and the mother respectively—appears to be, to prevent the prohibited degrees from becoming too large.

They have confined the prohibited degrees to the descendants of only four lines of male ancestors, namely, the father's and the mother's male ancestors as stated above, and the father's five maternal male ancestors, and the mother's three maternal male ancestors.

The latter two lines of ancestors are deduced in a curious manner, from the following text of Nárada on prohibited degrees,—

आसप्तमात् पञ्चमाच्-च बन्धुभ्यः पितृमातृतः ।

अविवाह्या सगोत्रा च समान-प्रवरा तथा ॥ १२, ७ ॥

Which means,—

"A damsel within the seventh and the fifth (degrees) from among the *bandhus* on the father's and the mother's sides,

should not be espoused, likewise also one of the same *gotra*, and one of the same *pravara*".

The term *bandhus* in this text undoubtedly means *sapindas*, inasmuch as this text cannot but be held to lay down prohibited degrees such as are ordained by other sages; and it would be perfectly consistent with other texts, only by putting that meaning on the word. It cannot surely be contended that Nárada does not prohibit *sapindas* at all, by taking the word *bandhus* in the limited sense of the three cognate first cousins of the parents, that are enumerated as their *bandhus* in the text cited in the Mitákshará chapter 2, section 6, para. 1, upon the assumption that the enumeration of *bandhus* in that text is *exhaustive*.

The recent commentators, however, have taken the word in that limited sense, and have deduced from Nárada's text the prohibition of six descendants of the father's five maternal ancestors, and of four descendants of the mother's three maternal ancestors, in a way which will be explained in the Chapter on Marriage.

Now, it is worthy of special notice that the prohibited degrees are thus ascertained, upon the footing that the enumeration of *bandhus* in the text referred to above,--is *exhaustive*, and not illustrative. How can then the prohibited degrees so ascertained, be reasonably relied on, for ascertaining who are *bandhus* upon the contrary footing that the said enumeration is *not exhaustive*, but is merely illustrative.

It is difficult to understand why F & B in the above table are not *sapindas* to each other. It appears to be admitted that F is *sapinda* to B, but it said that B is not *sapinda* to F. Bearing in mind that one is *sapinda* to another, if they are connected through particles of one body, it seems to be a contradiction in terms, to say that F is *sapinda* to B, but B is not *sapinda* to F. The reason assigned being that B not being a descendant of the line of the maternal grandfather of F or of his father and mother, they are not *sapindas* to each other. But it is not explained why, being such a descendant, is the *sine qua non* of mutual *sapinda* relation.

The real reason appears to be, that although B could not marry F's sister, still F could marry B's sister according to the recent commentators: because, the descendants of the father's mother's maternal ancestors, are not, according to them, included within prohibited degrees.

But according to the Mitákshará, F could not marry B's

sister ; because, she being a relation on F's father's side, and within seven degrees, is a *sapinda* for marriage. The two females C and D form two degrees whether they be in the descending line relatively to B, or in the ascending line relatively to F ; but according to the dogmatic view of the recent commentators, they cannot be so in the latter case.

Hence the *bhinna-gotra sapindas*, or *sapindas* of a different *gotra*, who are *bandhus* according to the Mitákshará, cannot reasonably be restricted in the manner maintained by the Tagore Law Professor of 1880 without any authority excepting his own erroneous novel construction of the verbal comments made by the two commentators of the Mitákshará, on Manu's text.

Village Community, and the above terms.—It may be interesting to enquire into and trace the etymological meaning of some of the terms, and the probable connection of the same with the Village Community System, and with their explanation as given above. The words *sapinda*, *sakulya*, *samánodaka*, *sagotra* and *samána-pravara* mean, respectively, those whose *pinda*, *kula*, *udaka*, *gotra* and *pravara* are common. *Gotra* is derived from *go* a cow and *trá* to protect, and means that which protects the cow, such as a pasturage ; *Udaka* is water or a reservoir of water such as a tank or well ; *Kulya* may be derived from *kula* (similar to Latin *colo*) to cultivate, and means a field or cultivated land ; and *pinda* means food.

According to the rules laid down by Manu (8,237-239) and Yájnavalkya (2, 166-167) relating to the establishment of villages, there should be a belt of uncultivated land, set apart for pasture, at least four hundred cubits in breadth, immediately round that part of a village, where the dwelling houses are situated, separating the same from the cultivated land ; and on that side of this belt, which is contiguous to the fields, hedges should be erected so high that a camel might not see over them, so that the cattle might not trespass into the fields.

Assuming that a single family established a new village, and bearing in mind that pasturage, and a reservoir of water indispensable in a tropical country, are not divisible according to Hindu Law, we may take the words *sagotra* and *samánodaka* to mean all members of the family, holding in common the pasturage and the reservoirs of water used for domestic or agricultural purposes ; the word *sakulya* to signify those members that jointly carried on cultivation ; and the word *sapinda* to comprise those that lived in common mess. When a family increased in the number of its members, they would

separate in mess first, and might still continue to hold in common their *kulya* or property, consisting mainly of land, by jointly carrying on the cultivation and dividing the produce according to their shares; and when this was felt to be inconvenient, they divided the family land, continuing, however, to use and occupy jointly the *gotra* or the land reserved for grazing the cattle, and the *udaka* or reservoirs of water, which remained common to the most distant agnatic relations. The plain meaning of the texts of Baudháyana and of the Brahma-Purána cited above, lends some support to this view.

CHAPTER III.

MARRIAGE.

ORIGINAL TEXTS.

१ । असपिण्डा च या मातुरसगोत्रा च या पितुः ।

सा प्रशस्ता द्विजातीनां दारकर्म्मणि मैथुने ॥ मनुः ३, ५ ।

(The Mitákshará, however, reads the first line of this text thus :—

असपिण्डा च या मातुरसपिण्डा च या पितुः ।)

सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते ।

समानोदकभावस्तु जन्मनाम्नोरवेदने ॥ मनुः ५, ६० ।

1. She, who is the mother's non-*sapinda* also (non-*sagotra*), and the father's (non-*sagotra*) also (non-*sapinda*), is commended for the nuptial rite and holy union amongst the twice-born classes.—Manu iii, 5.

(According to the reading of this text, adopted by the Mitákshará it would mean :—She, who is non-*sapinda* of the mother, and also non-*sapinda* of the father, is &c.)

But *sapinda* relationship ceases in the seventh degree (from the mother and the father); and the *Samánodaka* relationship ceases if (common) descent and name be not known.—Manu v, 60.

२ । न सगोत्रां न समान-प्रवरां भार्य्यां विन्देत ।

मातृत-स्वापञ्चमात् पुरुषात् पितृत-स्वासप्तमात् ॥

विष्णुः—२४, ९-१० ।

2. Let not a damsel be married who is of the same *gotra*, or of the same *pravara*, or within the fifth degree on the mother's side, or within the seventh on the father's side.—Vishnu, xxiv, 9-10.

३ । अविप्लुत-ब्रह्मचर्य्यो लक्षण्यां स्त्रियम् उद्वहेत् ।
अनन्य-पूर्व्विकां कान्ताम् असपिण्डां यवीयसीं ।
अरोगिणीं भ्रातृमतीम् असमानार्ष-गोत्रजाम् ।
पञ्चमात् सप्तमाद् ऊर्द्धं मातृतः पितृतस्तथा ॥

याज्ञवल्क्यः—१, ५२-५३ ।

3. Let a man who has finished his studentship, espouse an auspicious wife who is not defiled by connection with another man, is agreeable, non *sapinda*, younger in age and shorter in stature, free from disease, has a brother living, is born from a different *gotra* and *pravara*, and is beyond the fifth and the seventh degrees from the mother and the father respectively.—Yájnavalkya, i, 52-53.

४ । पञ्चमीं सप्तमीञ्चैव मातृतः पितृतस्तथा । मिताक्षराधृत-वशिष्ठवचनं ।

4. (A man may espouse a damsel who is) the fifth and the seventh (in degree) on the mother's and the father's side respectively.—Vasishtha cited in the Mitákshará while commenting on Yájnavalkya, i, 53.

५ । आसप्तमात् पञ्चमाच्च बन्धुभ्यः पितृमातृतः ।
अविवाह्या सगोत्रा च समान-प्रवरा तथा ॥ नारदः १२, ७ ।
सप्तमे पञ्चमे वापि येषां वैवाहिकी क्रिया ।
ते च सन्तानिनः सर्व्वे पतिताः शूद्रतांगताः ॥ नारद :—रघुनन्दनधृतः ।

5. A damsel within the seventh and the fifth (degrees) from among *bandhus* (= relations or *sapindas*) on the father's and the mother's sides respectively, should not be married, likewise one of the same *gotra*, and one of the same *pravara*. (Nárada xii, 7). Those among whom marriage rite takes place within the seventh and the fifth (degrees) respectively, they all with their offspring become degraded and reduced to the position of Súdras.—Nárada cited by Raghunandana.

६ । असमानार्षेयीं कन्यां वरयेत्, पञ्च मातृतः परिहरेत् सप्त पितृतः,
त्रीण् मातृतः पञ्च पितृतो वा । पैठीनसिः ।

6. Shall espouse a damsel not belonging to the same *gotra* shall avoid five (degrees) on the mother's side, and seven on the father's: or three (degrees) on the mother's side and five on the father's.—Paithínasi cited in the Mitákshará and by Raghunandana.

७। मातृपितृसम्बद्धाः आसप्तमाद्-अविवाह्याः कन्या भवन्ति, आपञ्चमाद्-अन्येषां मतं, सर्व्वाः पितृपत्न्यो मातरः, तद्भ्रातरस्तु मातुलाः, तद्दुहितरो भगिन्यः, तदपत्यानि भागिनेयानि, ताश्चाविवाह्याः, अन्यथा सङ्करकारिण्यः, तथाध्यापयितुरेतदेव ॥ रघुनन्दनधृत सुमन्तुवचनं ॥

7. Damsels connected on the mother's or the father's side shall not be taken in marriage, up to the seventh degree; up to the fifth degree, is the opinion of others: all the wives of the father are mothers, their brothers are maternal uncles, their daughters are sisters, their daughters are nieces, they too shall not be married, otherwise they would cause disorder; this applies also to the daughter of the *preceptor*.—Sumantu cited by Raghunandana.

८। असम्बद्धा भवेद् या तु पिण्डेनैवोदकेन वा।
सा विवाह्या द्विजातीनां त्रिगोत्रान्तरिता च या ॥ बृहन्मनुः।

8. She, who is not connected by *pinda* or water, is fit for marriage among the twice-born classes, as also she who is distant by three *gotras*.—Vrihat-Manu cited by Raghunandana.

९। आयाहीन्द्र पथिभिरीलितेभि र्यज्ञम् इमं नो, भागधेयं जुषस्व।
तृप्तां जहुर्मातुलस्येव योषा भागस्ते पैतृष्वसेयी वपाम् ॥ वेदः।

9. Indra! Come by paths that are praised, to this our sacrifice, accept the offering; well-cooked meat is offered (by us to thee), which is thy due, as (one's) maternal uncle's daughter or father's sister's daughter (is his due). Veda.

१०। तस्माद् वा समानाद् एव पुरुषाद् अत्ता चाद्यश्च जायते।
उत तृतीये सङ्गच्छावहै चतुर्थे सङ्गच्छावहै ॥ वाजसनेयके।

10. From the very same common stock are descended the enjoyer (husband) and the enjoyed (wife): we marry in the third or we marry in the fourth (degree).

११। त्रिंशद्वर्षो वहेत् कन्यां हृद्यां द्वादशवार्षिकीं।
त्र्यष्टवर्षोऽष्टवर्षां वा धर्म्मे सीदति सत्वरः ॥ मनुः—९।९४।

11. Let a man of thirty years marry an agreeable girl of twelve years, or a man of thrice eight years, a girl of eight years; one marrying earlier deviates from duty. (or one may marry earlier to prevent failure of religious rite).—Manu, ix, 94

१२। प्राप्ते द्वादशमे वर्षे यः कन्यां न प्रयच्छति।
माता चैव पिता चैव ज्येष्ठो भ्राता तथैव च।
त्रयस्ते नरकं यान्ति दृष्ट्वा कन्यां रजस्वलां॥
यस्तां विवाहयेत् कन्यां ब्राह्मणो मदमोहितः।
असम्भाष्यो ह्यपाङ्क्तेयः स विप्रो वृषलीपतिः॥ यमः २२, २३।

12. If a girl be not given in marriage when she has reached the twelfth year, her mother and father as well as her elder brother, these three go to the infernal regions having seen her catamenia before marriage. That Bráhmana who being blinded by vanity espouses such a girl should not be accosted, and should not be allowed to sit at a feast in the same line with Bráhmanas; for, he is deemed the husband of a Súdra wife.—Yama, 22, 23.

१३। प्राग्रजोदर्शनात् पत्नीं नेयात् गत्वा पतत्यधः।
व्यर्थीकारेण शुक्रस्य ब्रह्महत्याम् अवाप्नुयात्॥ निर्णयसिन्धुधृत-
आश्वलायनवचनं।

13. (A man) shall not approach the wife before the appearance of catamenia; approaching, becomes degraded, and incurs the sin of slaying a Bráhmana by reason of wasting the virile seed.—A'svaláyana cited in the Nirnayasindhu.

१४। पिता पितामहो भ्राता सकुल्यो जननी तथा।
कन्याप्रदः पूर्व्वनाशे प्रकृतिस्थः परः परः॥
अप्रयच्छन् समाप्नोति भ्रूणहत्याम् ऋतावृतौ।
गम्यं त्वभावे दातॄणां कन्या कुर्य्यात् स्वयंवरं॥ याज्ञवल्क्यः १,६३ ६४।

14. The father, the paternal grandfather, the brother, a *sakulya* or member of the same family, the mother likewise; in default of the first (among these) the next in order, if sound in mind, is to give a damsel in marriage; not giving, becomes tainted with the sin of causing miscarriage at each of her courses (before marriage); in default, however, of the (aforesaid) givers, let the damsel herself choose a suitable husband.—Yájnavalkya, i, 63-64.

१५। पिता पितामहो भ्राता सकुल्यो मातामहो माता चेति कन्याप्रदः
पूर्व्वाभावे प्रकृतिस्थः परः परः। विष्णुः २४,३८-३९।

15. The father, the paternal grandfather, the brother, a *sakulya*, the maternal grandfather and the mother; in default of the first among

these, the next in order, if sound in mind, is the giver of a maid in marriage.— Vishnu, xxiv, 38-39.

१६। पिता दद्यात् स्वयं कन्यां भ्राता वानुमते पितुः ।
मातामहो मातुलश्च सकुल्यो बान्धवस्तथा ।
माता त्वभावे सर्व्वेषां प्रकृतौ यदि वर्त्तते ।
तस्याम् अप्रकृतिस्थायां कन्यां दद्युः स्वजातयः ॥ नारदः १२,२०-२१ ।

16. The father himself shall give a girl in marriage, or with his assent the brother, the maternal grandfather and maternal uncle, and a *sakulya*, a *bándhava* likewise: on failure of all, however, the mother, if she is in sound mind; if she be not in sound mind, the people of the same caste shall give a damsel in marriage.—Nárada, xii, 20-21.

१७। पिता रक्षति कौमारे भर्त्ता रक्षति यौवने ।
पुत्रो रक्षति वार्द्धक्ये न स्त्री स्वातन्त्र्यमर्हति ॥ मनुः ९, ३ ।

17. A woman is not entitled to independence: her father protects her in her maidenhood, her husband in her youth, and her son in her old age.—Manu, ix, 3.

१८। रक्षेत् कन्यां पिता, विन्नां पतिः, पुत्रस्तु वार्द्धके ।
अभावे ज्ञातयस्तेषां न स्वातन्त्र्यं क्वचित् स्त्रियाः ॥ याज्ञवल्क्यः १,८५।

18. A woman is never entitled to independence let the father protect her when maiden, the husband when married, the son when old, and in their default their kinsmen.—Yájnavalkya, i, 85.

१९। कन्या वरयते रूपं माता वित्तं पिता श्रुतं ।
बान्धवाः कुलम् इच्छन्ति मिष्टान्नम् इतरे जनाः ॥

19. The bride is anxious for beauty, her mother for wealth, her father for education, her relations for family honour (in the bridegroom), and all the rest for a sumptuous feast.

२०। यस्मै दद्यात् पिता त्वेनां भ्राता वानुमते पितुः ।
तं शुश्रूषेत जीवन्तं संस्थितञ्च न लङ्घयेत् ॥
मङ्गलार्थं स्वस्त्ययनं यज्ञश्चासां प्रजापतेः ।
प्रयुज्येत विवाहेषु, प्रदानं स्वाम्यकारणं ॥ मनुः, ५, १५१-२ ।

20. To whom the father has given her, or the brother with the father's assent, him shall she serve while he is alive; and shall not disregard (her duties to him) when dead.

The recitation of the benedictory sacred texts, and the sacrifice (with Homa in the nuptial fire) in honour of (the God) Prajápati (= Lord of creatures.) are used in marriages, for the sake of procuring good fortune (to the brides): but the gift (by the father) is the cause of the status of husband (or the marital dominion of the husband). Manu, v, 151-152.

२१। पाणिग्रहणिका मन्त्राः कन्यास्वेव प्रतिष्ठिताः ।
नाकन्यासु क्वचित्-नृणां लुप्तधर्म्मक्रिया हि ताः ॥
पाणिग्रहणिका मन्त्राः नियतं दारलक्षणं ।
तेषां निष्ठा तु विज्ञेया विद्वद्भिः सप्तमे पदे ॥ मनुः, ८, २२६ ७ ॥

21. The sacred nuptial texts are applied solely to virgins and not, among people anywhere, to non-virgins, since these are excluded from religious rites. The sacred nuptial texts are the certain cause of the sacrament of marriage, their completion is known by the learned to be on the seventh step.– Manu, viii, 226-227

MARRIAGE.

Marriage necessary according to Sastras, exceptions. The institution of marriage which is the foundation of the peace and good order of society, is considered as sacred even by those that view it as a civil contract. According to the Hindu Sástras it is more a religious than a secular institution. It is the last of the ten sacraments or purifying ceremonies. The Sástras enjoin men to marry for the purpose of procreating a son necessary for the continuation of the line of paternal ancestors and for the spiritual benefit of their and his souls. According to our Sástras a man may not at all enter into the order of householder, or the married life, but may choose to continue a life-long student when he is desirous of *moksha* or liberation from the necessity of transmigration of souls, or in other words, the necessity of repeated deaths and births. But you must not mistake for life long students all bachelors, most of whom do not marry, not because they are averse to the pleasures of marriage, but because they are unwilling to take upon themselves the responsibilities of conjugal life. These do not bear the remotest resemblance to the life-long students that are to lead the austere life of real celibacy.

Marriage in ancient law, and the religious principle. In ancient times marriage involved the idea of the transfer of

dominion over the damsel, from the father to the husband. Slavery, or the proprietary right of man over man, was a recognised institution among all ancient nations, and it appears to have owed its origin to the *patria potestas* or the father's dominion and unlimited power over his child. A daughter was an item of property belonging to her father who could therefore transfer her by sale, gift or other alienation, like any other property; and marriage consisted in the transfer, in any one of the said modes, of the parental dominion over the bride, to the bridegroom who acquired by the transaction, the marital dominion over her. Marriage by capture was also based on the same principle. The condition of a slave, a wife, and a son or daughter, was similar in ancient law, and founded on the same principle of absolute dependence on the one side, and of unlimited power, extending to even that of life and death, on the other. The earliest and common form of marriage was the sale of the bride for a price paid to her father by the bridegroom. The father's choice in the matter was under such circumstances likely to be influenced more by the amount of the price offered, than by a consideration of the alliance being beneficial to the daughter. This purely selfish and secular principle became in course of progress, repugnant to refined feelings, and the Hindu sages sought to establish the altruistic and religious principle as the only guide for the father's selection, by laying down that the free gift, of a daughter decked with dress and ornaments, to a suitable husband to be found out by him, without any other consideration than her happiness, is an imperative religious duty imposed on the father, --and by condemning the existing practice of marriage by sale in consideration of the *sulka* or bride's price, as being unworthy of persons having a sense of spiritual responsibility, and a pretension to purity, whose conduct should be characterised by higher principles, although that practice might be allowed to Súdras among whom purity of conduct could not be expected.

Religious and secular marriages.--Accordingly the Hindu sages divided marriages into eight kinds for the purpose of distinguishing those that are approved on account of there being no improper motive on the part of any person concerned in them and are therefore declared to be religious, from those that are condemned on some ground or other, and are therefore disapproved and pronounced to be irreligious. In the marriage called Bráhma, the father or other guardian of the bride has to make a *gift* of the damsel adorned with dress and

ornaments to a bachelor versed in the Brahma or Veda, and of good character, who is to be sought out and invited by the guardian, to accept the bride offered to him. In the Daiva marriage the damsel is given to a person who officiates as a priest in a sacrifice performed by the father, in lieu of the Dakshiná or fee due to the priest; it is inferior to the Bráhma because the father derives a benefit, which being a spiritual one is not deemed reprehensible. Still inferior is the A′rsha marriage in which the bridegroom makes a present of a pair of kine to the bride's father, which is accepted for religious purpose only, otherwise the marriage must be called A′sura described below. Another kind of approved marriage is called Prájápatya which does not materially differ from the Bráhma, but in which the bridegroom appears to be the suitor for marriage and he may not be bachelor, and in which the gift is made with the condition that "you two be partners for performing secular and religious duties." These are the four kinds of marriage, the male issue of which confers special spiritual benefit on the ancestors.

The four disapproved and censured kinds of marriage are the Gándharva, the A′sura, the Rákshasa, and the Paisácha. The Gándharva marriage, which is not disapproved by some sages, appears to be the union of a man and a woman by their mutual desire, and to be effected by consummation; this seems to be inconsistent with the father's *patria potestas* over the damsel, and it appears to relate either to cases where a damsel had no guardian, or to cases where consummation by mutual desire had already taken place, and the law requires that the father should give his assent to the daughter's marriage with the man. The A′sura marriage amounted to a sale of the daughter: the Sulka or the bride's price was the moving consideration for the gift by the father, of the daughter in marriage. The Rákshasa was marriage by forcible capture, allowed only to the Kshatriyas or military class. The Paisácha marriage was the most reprehensible, as being marriage of a girl by a man who had committed the crime of ravishing her either when asleep or when made drunk by administering intoxicating drug. You must not think that this is an instance in which fraud is legalized by Hindu law; the real explanation appears to be that chastity and single-husbandedness were valued most, and so the Hindu law provided that the ravisher should marry the deflowered damsel. It appears, therefore, that the Gándharva and the Paisácha marriages were preceded and caused by sexual intercourse, in the first case

with the consent of the girl, and in the second by fraud. The A'sura and the Gándharva seem to resemble respectively the *Co-emptio* and the *Usus* in Roman law which, however, positively forbade the Paisácha marriage.

The Hindu ideal of marriage is, that it is a holy union for the performance of religious duties; hence, where the sexual pleasure is the predominant idea in the mind of a party to it, it is disapproved and is condemned as a secular marriage, as distinguished from that in which the religious element prevails. The custom of marriage of girls before puberty proves that the idea of sexual pleasure is not associated with the holy nuptial rite of the Hindus. The legal consequences of the approved and the condemned marriages, are different; a wife married in an approved form becomes a *Patní*, but one espoused in the disapproved form does not become a *Patní*. According to the Mitákshará a *Patní*, or the lawfully wedded wife, or the indispensable associate for religion, becomes his *sapinda*, and may become his heir, and her husband also may become her heir: whereas a wife who is married in a disapproved form and consequently does not become *Patní*, does not become her husband's *sapinda*, and cannot inherit from her husband, nor can he inherit from her. This distinction, however, is not recognised by our courts, and wives espoused in the A'sura marriage which though disapproved is still prevalent among many classes of Hindus, enjoy the rights of a *Patní* or lawfully wedded wife.

It should be remarked that these eight kinds of marriage are not really eight different *forms* of marriage, as they are loosely called; the form appears to be the same in all cases except perhaps in the Gándharva and the Rákshasa, namely, the gift and acceptance of the damsel, coupled with religious rites which are necessary and more multiplied in the approved ones. This form of gift and acceptance seems to be observed even by Christians, among whom it is undoubtedly a survival.

Definition of marriage, and marriage without consent.—Marriage is defined by Raghunandana to be the acceptance by the bridegroom, of the bride, constituting her his wife. The bride is not, in one sense, a real party to the marriage which is a transaction between the bridegroom and her guardian, in which she is the subject of the gift. The expression 'bride's marriage' is said to be a figurative one. The Hindu law vests the girl absolutely in her parents and guardians by whom the contract of her marriage is made, and her consent or non-consent is not taken into consideration at all: I.L.R., 21 B., 29. According to

the sages a man has to choose a damsel agreeable to himself for his wife, and the lowest age for his marriage is twenty-four. But contrary to the Sástras a custom has grown up according to which marriages are negotiated by the guardians of the bridegrooms and are celebrated at an earlier age; and excepting in a few instances, the real parties to the marriage see each other for the first time, when they are actually passing through the ceremony of wedlock. But nevertheless it is an indisputable fact that in the majority of instances Hindu marriages, though thus contracted, do not prove to be unhappy ones.

Justification of marriage without express consent.—There are many persons who being dazzled and blinded by the material civilization and the political greatness of the European nations, consider their social institutions to be superior to those prevalent amongst the Hindus whose political degradation is attributed by them to the assumed inherent inferiority of their social organization and also of their religion. Marriage by mutual consent of grown up men and women is what prevails among the Christian nations of Europe, and is on that account thought to be the most civilized and proper form; whereas the contrary is the rule in India, which is therefore taken to be a barbarous usage and an evil of a grave character. The Hindus, however, say that when you cannot have your mother and father, your brother and sister, or any other relation, according to your choice, why then should you have a wife or a husband according to your own choice? If all other dear and near relations are yours without your choice, you may as well have a wife or a husband dear to you though chosen by others; and this is conclusively proved by what you find in Hindu society. The alleged superiority again of marriage by mutual consent, is negatived by the fact of there being so many divorces and separations, showing that union by choice is not the condition of the happiness of married life. As for political greatness and degradation, there are pious men who would say that the height of the political greatness of a nation is often the measure of the depth of its religious degradation; for the attainment of worldly prosperity by one nation is frequently accomplished at the expense of others, and, therefore, by transgressing the rules of religion.

Early marriage of Hindu girls, father's duty.—It is a religious duty imposed by the Hindu Sástras upon the father or other guardian of a damsel, that she should be disposed of in marriage at a tender age not earlier than the eighth year, but before the signs of puberty make their appearance. The reason

of the rule appears to be three-fold. The first is,—that marriage should be contracted from a sense of religious duty, and not from a desire of sexual pleasure, and so the immediate gratification of it is made impossible. The second is,—that by marriage a girl becomes not only the partner in life of her husband, but becomes a member of the joint family to which her husband belongs ; and that, therefore, being admitted into the family at a tender age when her mind and character are yet unformed, and placed amidst the associations and peculiarities of the family of her husband, she becomes assimilated to it, upon which she is, as it were, engrafted in the same way as a member born in it. The third reason is, -the anxiety felt by the Hindu legislators for securing the chastity of females, which is the foundation of the happiness of home, of the belief in the reality of the family tie and relationship, and of the mutual love and affection of the relations towards each other based thereon, which are so prominent in Hindu society. The two strongest propensities to which man in common with the lower animals is subject, are the desire for food and the desire for offspring. With the first he is born, and the second manifests itself later on at a certain stage of development : and marriage of a damsel before that age is strictly enjoined, so that her mind may be concentrated on her husband alone as the means for the gratifications of that appetite. And it cannot but be admitted that in the generality of cases the attachment that grows up between the husband and the wife is of the strongest kind, and the devotion of Hindu wives to their husbands is unparalleled.

It should, however, be particularly noticed that while the Hindu sages enjoin the early marriage of females, they do at the same time, condemn in the strongest terms, the premature consummation of the same : (Text No. 13).

I have already told you that according to modern practice even the bridegroom is a mere passive agent in marriage. Our Sástras, however, appear to lay down that he should be a free agent in this matter, and contract it at a mature age when he is in a position to fully understand the responsibilities of conjugal life.

Early marriage such as at present prevails in our society is considered as an evil by many 'educated' Hindus. Some condemn the early marriage of females on the ground that it may lead to premature consummation. Others disapprove of early marriage of the young men that are prosecuting their studies as students. They do really condemn the modern practice in so far as it is contrary to the Sástras.

Objections to two rules of marriage, considered.—Exception, however, is taken to the two rules of the Sástras, the first of which imposes the duty on the father or other guardian of girls, of providing them with suitable husbands before puberty ; and the second of which enjoins all men to enter into matrimony.

The objection to the first rule has arisen from the fact that the observance of the rule entails ruin upon fathers of daughters in consequence of the heavy expenditure they are compelled to incur in disposing of their daughters in marriage. A most pernicious custom has been growing up in our society according to which bridegrooms are becoming marketable things, and extortionate demands are made by their guardians, that are to be satisfied by the bride's father in order to bring about the marriage The custom owes its origin to the vanity of the Calcutta people, but it is gradually extending its mischievous influence over the Muffassil. It is detrimental to the best interests of the Hindu community, and directly or remotely it affects every member of Hindu society, not excepting those that blinded by a short-sighted policy believe themselves to be gainers. The good sense of the Hindu community seems to have left them altogether, as in a matter of such vital importance to their society they do not exert themselves and make any efforts to put down the growth of this reprehensible custom.

The objection to the second rule is of a very serious character. By the contact with Western civilization the ideas regarding comforts have expanded amongst all classes of people, 'educated' or not ; the simplicity in the habits of Hindu life is passing away ; and marriage is almost come to be regarded as a luxury, its responsibilities having become heavier than before. To the early and improvident marriages is attributed the want of self-respect, self-reliance, independence and enterprising spirit, that, in one sense, characterises the Hindus, and that is thought to have led to their present political degradation.

The Hindu civilization and the Western civilization are different in character and somewhat opposed to each other. The western civilization is directed to the promotion of the happiness and prosperity in this world, of the people of the different localities respectively, that constitute different political states. Whereas Hindu civilization is directed to the attainment of happiness in the next world in the true sense of the term. For according to the Christian belief, their next world is not to commence until doomsday ; while according to the Hindu belief, it commences immediately after death, when the human

soul attains liberation or eternal beatitude, or assumes another heavenly or earthly body, according to its merits and demerits. The Hindus are therefore more religious than worldly. Self-abnegation, self-sacrifice and self-humiliation are necessary for the attainment of their religious aspiration, and the passiveness, the mildness, the tenderness and the dependent spirit of the Hindus, are the effects of their institutions moulded in a way calculated to subserve that purpose.

The great question, therefore, relates to the *summum bonum* and the mode of its attainment, and the continuance of our institutions depends upon its solution, or rather upon the belief in this respect.

It cannot but be admitted, however, that the rule itself is required by the law of nature, and non-compliance with it is attended with illegitimacy and various other vices.

The questions relating to Hindu marriage—may be dealt with under five heads, namely, (1) prohibited degrees for marriage, (2) inter-marriage between different castes, (3) liability and guardianship for marriage of maids, (4) betrothal and ceremonies effecting marriage, and (5) legal consequences of marriage.

PROHIBITED DEGREES.

Principles of prohibited relationship for marriage.—The principles on which marriage is prohibited are discussed in Bentham's Theory of Legislation. The joint family system, which is a cherished institution of the Hindus, and which is the normal condition of their society, accounts for the prohibition by the Hindu sages, of marriage between larger number of relations than by other systems of jurisprudence. There are strong physiological reasons in support of the rules of Hindu law on this subject; and the same social reasons that render it necessary to forbid the marriage between brothers and sisters, would justify the prohibition of marriage between relations that may be members of a joint Hindu family. Those relations that are called to live together in the greatest intimacy from their birth, as well as those, one of whom stands in *loco parentis* to the other, should not be allowed to entertain the idea of marrying each other, and an insurmountable barrier between their nuptial union should be raised in the form of legal prohibition, so that the belief in the chastity of young girls, that powerful attraction to marriage, may be maintained unshaken. The Hindu legislators, however, are so anxious to

secure the foundation of this belief, that they ordain it to be an imperative religious duty of the father and the like relations, to dispose of damsels in marriage before the signs of puberty make their appearance, so that there might not be the shadow of a doubt in that respect.

Sages and Vedic texts on prohibited degrees.—I have already told you that the different sages have laid down different rules on the subject of prohibited degrees for marriage (p. 70). Most of their texts are given at the commencement of this chapter. (See Texts Nos. 1-10). On a perusal of these you will perceive the divergence between them; Manu prohibits the largest number, while Paithínasi the smallest. There is another important respect in which Manu and Sumantu differ from the other sages, namely, that the former prohibit the same number of degrees on both the father's and the mother's sides, whereas the others forbid a larger number on the father's than on the mother's side: the former view appears to be agreeable to popular feelings and in accordance with the actual practice. Another point deserves special notice, namely, that the language of Manu's text clearly shows that the rule propounded by him is recommendatory in character; and the actual usages of marriage, prevalent, in various localities and among divers tribes, prove the rules propounded by all the sages to be of that character.

Of the two Vedic texts (Nos. 9 and 10) one says that damsels of the third and the fourth degrees are espoused, evidently on the mother's and the father's side respectively: while the other implies marriage of cognate first cousins.

Customs thereon actually observed.—It is worthy of special remark that Paithínasi's *alternative rule* prohibiting only *five* degrees on the father's side, and *three* on the mother's, is actually *observed* in practice by the Bráhmanas of Bengal; and that the *Vedic text* indicating marriage of the *father's sister's daughter* and of the *mother's brother's daughter*, and thereby implying the prohibition of only two degrees on both sides, is actually *followed* in practice by even the Bráhmanas of Madras, and by the Kshatriya holders of impartible estates in the Jungle Mahals of West Bengal, and also by the Kshatriyas of many other places. There is an well-known precedent of marriage of the *maternal uncle's daughter*, namely, the espousal by the Kshatriya prince Arjuna—the hero of the battle of Kurukshetra, that internecine war which extirpated the warrior class of India,—of Subhadrá the beautiful daughter of Vasudeva and sister of Sríkrishna the incarnate Deity.

Table of prohibited degrees by different authorities.—The following table shows very clearly the diversity in the numbers of degrees of cognate damsels prohibited by different authorities:—

Authorities.	*Prohibited on father's side.*	*Prohibited on mother's side.*
Manu	7	7
Sumantu	7	7
Do. says, according to others	5	5
Vishnu	7	5
Yájnavalkya	7	5
Vasishtha	6	4
Paithínasi	7	5
	5	3
Yajurveda	3	2
Vedic text	2	2

Mita'kshara' on prohibited connection for marriage.—I have already given you the substance of the comments made by the Mitákshará upon the texts of Yájnavalkya on this subject (pp. 68-73), while discussing the definition of the term *Bandhu.* The texts of Yájnavalkya are cited at pages 51 and 81 *supra* and with a view to enable the students to correctly understand the subject of Sapinda relationship for the purposes of marriage as well as of inheritance, the original passages of the Mitákshará bearing on the subject, with their translation, have been given at pp. 52-56 *supra.*

I think it necessary to give some details in the present connection. The Mitákshará says that the qualification that the bride should be non-*sapinda* applies to all castes, for the *sapinda* relationship exists everywhere : but the qualification that she shall not belong to the same *gotra* and *pravara* applies only to the three regenerate tribes ; although the Kshatriyas and the Vaisyas have no *gotras* of their own, and therefore no *pravaras*, yet as they have *gotras* and *pravaras* derived originally from their ancient Gurus, the rule is applied to them also ; in support of this a text of A'svaláyana is cited : and then the Mitákshará goes on to say that the status of wife does not arise (among regenerate tribes) should the bride be a *sápinda* or *samána-gotra* or *samána-pravara* ; but the status of wife does arise although she may be diseased or the like ; for (the text No. 3 is merely recommendatory and not mandatory as regards the other qualifications of the damsel to be chosen for marriage, since) there would be only inconsistency with perceptible (and not with any spiritual) reasons (in case there be marriage of damsels having the other disqualifications

mentioned in Yájnavalkya's text, such as disease). Then the Mitákshará observes that as the qualification that the bride shall be non-*sapinda*, *i. e.*, non-relation, is too wide, according to the meaning of the word *sapinda* already explained, namely, a relation connected through the same body, therefore Yájnavalkya has added, —"*beyond the fifth and the seventh from the mother and the father respectively.*" And then goes on to explain this text in the passage which has been cited at pages 53-54 *supra*.

From the comments of the Mitákshará in that passage it appears to follow that "*the fifth and the seventh*" are to be counted from the mother and the father respectively, and that the seven ancestors on the father's side and the five on the mother's, may be traced through males or females, or both; for, although the Sanskrit word for degree is *purusha* which also means a male, yet it cannot on that account be contended that the lines must pass through the males only, inasmuch as in computing the five degrees on the mother's side, the mother is taken as one degree or *purusha*; and I have already told you that according to the latest commentators the downward lines from each of the ancestors may pass through males or females indifferently. Hence the maternal relations of the paternal as well as of the maternal grandfather, and of the paternal great-grandfather appear to be prohibited by the above rule of *sapinda* relationship for marriage; if the rule prohibiting five degrees from the mother of the *propositus* be extended to the maternal relations of the father and other paternal ancestors, instead of applying the rule of seven degrees on the father's side to the maternal relations of the paternal ancestors.

Let us now see what the later commentators say on the subject.

Later commentators on prohibited degrees.—The rules regarding prohibited degrees, extracted from the foregoing texts of the sages, by Raghunandana in his Udváhatattva, a treatise said to be respected in Bengal, are to be found in Dr. Banerji's valuable Tagore Lectures on the subject (pages 60-67). The same rules are reiterated by Kamalákara Bhatta, the author of the Nirnaya-sindhu which is regarded as an authority in the Benares School.

The rules contained in these works may be summarised as follows:

I. A man cannot marry a girl of the same *gotra* or *pravara*. This rule is called exogamy. . This rule does not apply to the

Súdras who are said to have no *gotras* of their own; but it applies to the Kshatriyas and the Vaisyas, although it is alleged that neither have they any *gotra* of their own. The *gotras* of those three inferior castes are said to be those of the Gurus or preceptors, or the priests of their ancestors.

II. A man cannot marry a girl who is a cognate relation of any of the following descriptions:

(*a*) If she is within the seventh degree in descent from the father or from any of his six male ancestors in the male line, namely, the paternal grandfather and so forth.

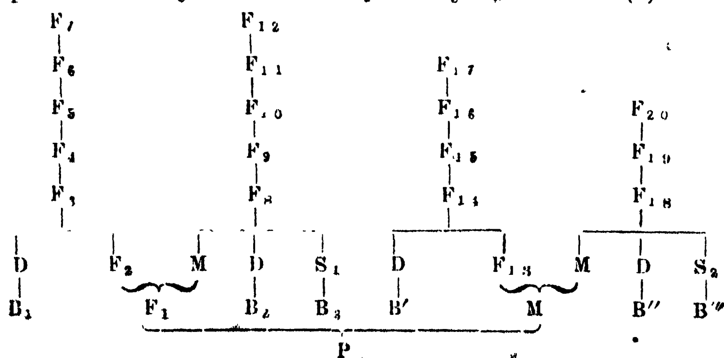
(*b*) If she is within the fifth degree in descent from the maternal grandfather or from any of his four paternal ancestors in the male line, the five degrees from the mother being counted by them exclusive of the mother.

(*c*) If she is within the seventh degree in descent from the father's *bandhus* or from any of their six ancestors through whom the girl is related.

(*d*) If she is within the fifth degree in descent from the mother's *bandhus* or from any of their four ancestors, through whom the girl is related.

III. A man cannot marry certain damsels though there is no consanguine relationship between them. They are the step-mother's sister, her brother's daughter, and his daughter's daughter; the paternal uncle's wife's sister, and the wife's sister's daughter, and the preceptor's daughter. This rule appears to be of moral obligation only, since it is not respected. Accordingly, it has been held that a marriage between a Hindu and the daughter of his wife's sister is valid: *Ragav* v. *Jaya*, I. L. R., 20 M., 283.

The second rule is somewhat complicated. The following diagram will enable you to understand without difficulty, those that are prohibited by this rule, especially by clauses (*c*) and (*d*).



P is the bridegroom. F_1 to F_7 are his seven paternal ancestors in the male line; F_8 to F_{12} are his father's five maternal ancestors in the male line; F_{13} to F_{17} are his mother's five paternal ancestors in the male line; F_{18} to F_{20} are his mother's three maternal ancestors in the male line; B_1, B_2 and B_3 are his father's *bandhus*; and B′, B″ and B‴ are his mother's *bandhus*.

The damsels that are prohibited to a man by the second rule are those that are within the seventh degree in descent from F_1 to F_{12}, from B_1, B_2 and B_3 and from S_1; and that are within the fifth degree in descent from F_{13} to F_{20}, from B′, B″ and B‴, and from S_2.

To this rule there is an exception, namely, that a girl, though within the seventh or the fifth degree as above described, may be taken in marriage if she is removed by three *gotras*, or in other words, by two intervening *gotras*, so that there must be four different *gotras* in the line of relationship including those of the bridegroom and the bride; but according to some, five such *gotras* are necessary. This shows that the lines of descent from the ancestors may pass through females only, who are transferred by marriage to different *gotras*.

Observations on the above rules.—Upon a careful study and consideration of the above rules, the texts from which they are deduced, and the reasons by which they are supported, the following observations suggest themselves:

1. The Bráhmanical commentators say, as I have already told you, that the Kshatriyas, the Vaisyas and the Súdras have no *gotras* of their own, and that the *gotras* they have, are those of the preceptors or priests of their ancestors; yet they maintain that the Kshatriyas and the Vaisyas cannot marry within their *gotras*, but the Súdras can; although the reason assigned in support of this distinction, does not appear to be a cogent one.

2. In construing the texts (Nos. 1–7) prohibiting certain number of degrees on the mother's and the father's side, the later commentators restrict the counting of the upward degrees to the male line of the paternal male ancestors only, of both the mother and the father, as in the first and the third line in the above diagram; although in counting the descendants of each of those ancestors, they admit that the lines of descent may pass through both males and females indifferently, but no reason is assigned for drawing this distinction. They then deduce the prohibition of the relations indicated by the second

and the fourth line of ancestors in the above diagram, by putting a forced construction on the text (No. 5) of Nárada, which ordains that a girl within the seventh and the fifth from among the *bandhus* or relations on the father's and the mother's sides respectively, is not fit for marriage,—by taking the word *bandhu* in that text in the limited sense of the nine *cognates* enumerated in a particular text (Mit. 2, 6, 1), although there cannot be the slightest doubt that Nárada intended by that text to mean and include all the prohibited degrees both agnates and cognates, and that he employed the term *bandhu* in the sense of *sapinda*.

The truth seems to be that the later commentators found practical difficulty in avoiding all the damsels, coming within the rule, by counting the upward degrees through both male and female ancestors without distinction; so they thought it desirable that the descendants of the four lines of ancestors given in the above diagram should only be prohibited, and accordingly they put their own peculiar construction upon the texts for supporting their foregone conclusion.

3. That the later commentators count the number of degrees from the mother and the father respectively, by excluding the *propositus* and also the mother as shown in the 1st, the 2nd and the 3rd line of the diagram, while the Mitákshará counts from the parents by excluding the *propositus*, but it includes the mother as one degree.

4. That the seventh and the fifth descendants of the father's and the mother's *bandhus* respectively are prohibited; and they are the ninth and the seventh respectively, from the nearest common ancestor of the *propositus*: but there is no reason for this special rule.

5. That the sixth and the seventh descendants of F_8 to F_{12} who are P's father's maternal ancestors, are prohibited to P, but not to his father through whom they are related to P; or in other words, those relations of the father are not *sapindas* to him for the purpose of marriage, as they are on his mother's side and beyond the fifth degree; and yet they are *sapindas* to his son,—a monstrous proposition sought to be explained by what is called "the analogy of the frog's leap" which is beyond the comprehension of human beings save the narrow-minded and speculative Sanskrit writers of the dark age of Mahomedan India.

6. That there is no reciprocity; for, P cannot espouse many damsels, whose brothers, however, may, according to the

above rule, marry P's sister, and *vice versa*. This appears to be opposed to the popular notion according to which, A may marry B's sister, if B may marry A's sister. There is no reason why a larger number of degrees should be prohibited on the father's than on the mother's side, so far as relationship is concerned : for, the human body, says the Garbha-Upanishad, consists of six parts, of which three, namely, bone, sinew and marrow are derived from the father, and three, namely, skin, flesh and blood, from the mother.

7. That marriages do, often, take place in contravention of these rules even among those who would follow the same, by reason of the ignorance of distant relationship, owing to the difficulty in tracing out the relationship at the present time when people induced by the sense of security to life and property, enjoyed under the British rule, set up permanent dwelling houses in places distant from their ancestral homes, where they reside for the practice of any profession or calling, or for service.

These rules not all followed in practice.—I have already told you that these rules are not followed in practice. Different usages prevail among different tribes and in different localities. There is so much divergence between the sages as well as between the commentators on this subject, that it would not be safe to enforce their views as binding rules of conduct. The rule prohibiting marriage within the same *gotra*, which appears to be followed by the Bráhmanas in all places, is, however, too extensive, but it was laid down at a time when there appears to have been a local union of the families having the same *gotra* and *pravara*. When this rule does not apply to Súdras, there is no reason why it should apply to the Kshatriyas and the Vaisyas, as these three tribes stand on the same footing in this respect, if what the commentators say be correct. The Bengal Káyasthas, however, follow this rule in practice, and do not marry within their *gotra*, although they are supposed to be Súdras, by reason of their observance of some usages prescribed for the latter. It would seem reasonable that the legal rule of prohibited degrees for marriage cannot be different for different castes : hence, it would follow that what is valid marriage among the Súdras is also valid even among the Bráhmanas, notwithstanding special rules to the contrary, which should be treated as Laws of Honour, the violation of which will not invalidate the marriage, but will simply lower the position of the transgressor : (see text No. 5). It is useless to discuss this point at length, as the rules are not followed in practice, by all.

Customs contrary to Smritis.—Even the custom of marriage within the *Gotra*, is found to prevail among certain sections of the Bráhmanas : see sub-judge's judgment in *Devi* v. *Rani Radha* 31 I. A., 160. It has already been said that in Madras there is a custom prevailing even among the Bráhmanas, of marriage of a man with his maternal uncle's or paternal aunt's daughter. There is a text of the Sruti (text No. 9) in support of this custom, and the instance of Arjuna's marriage with Subhadrá, his maternal uncle's daughter, forms an well-known precedent. This custom appears to be observed by Kshatriyas in many places. It prevails among the families owning impartible Rajes in the Jungle Mahals of West Bengal, that claim to be Kshatriyas. The reason for this laxity has already been stated, (p. 71). It should be noticed that for the purpose of marriage there is no *sapinda* relationship between cognates, where or among whom this custom prevails.

The practical rule of prohibited degrees—for our courts to follow, is, as I have already told you (p. 71 *supra*), to pronounce a marriage to be valid, which has been celebrated in the presence, and with the presumed assent, of the relatives and the caste-people.

INTERMARRIAGE BETWEEN DIFFERENT CASTES.

The caste system -is the peculiar social organisation of the Hindus. There being no rational principle upon which the hereditary caste system, irrespective of qualifications, could be based, it is generally represented by comparatively modern writers of the Bráhmanical class who are most interested in maintaining it, to be a divine institution existing from the beginning of creation. But the sacred books contain no uniform or consistent account of its origin : the various accounts of it given by the different works of ancient Sanskrit literature, you will find, collected together with considerable research by Dr. Muir in the first volume of his Sanskrit Texts.

In some of the Puránas, castes are described as coeval with creation ; while there are others which say that originally there was but one caste which became multiplied in the Tretá or third age of the world owing to deterioration of men. The Mahábhárata categorically asserts that at first there was no distinction of classes, but that these have subsequently arisen out of differences of character and occupation ; and that the

title of a person to recognition as Bráhmana depends not on heredity, but on possession of superior merits :—

युधिष्ठिर: । सत्यं दानं क्षमा शीलम् आनृशंस्यं तपो घृणा ।
दृश्यन्ते यत्र नागेन्द्र स ब्राह्मण इति स्मृत: ॥
सर्प: । शूद्रेष्वपि च सत्यं च दानम् अक्रोध एव च ।
आनृशंस्यम् अहिंसा च घृणा चैव युधिष्ठिर ॥
युधिष्ठिर: । शूद्रे तु यद् भवेत् लक्ष्म द्विजे तच्च न विद्यते ।
न व शूद्रो भवेत् शूद्रो ब्राह्मणो न च ब्राह्मण: ॥
यत्रैतल् लक्ष्यते सर्प वृत्तं स ब्राह्मण: स्मृत: ।
यत्रैतन् न भवेत् सर्प तं शूद्रम् इति निर्दिशेत् ॥

आरण्यकपर्वणि आजगरपर्वणि १८० मे अध्याये ।

"Yudhisthira said, he is ordained to be Bráhmana in whom are found truthfulness, charity, forgiveness, uprightness, harmlessness, austerity and compassion.

"The serpent said, but O Yudhisthira, even in Súdras (are found) truthfulness, charity, absence of wrath, harmlessness, tenderness to living beings and compassion.

"Yudhisthira replied, If in a Súdra (by birth) the characteristic (of Bráhmanas) exists, and in a twice-born (by birth) the same does not exist, then the Súdra (by birth) should not be (regarded) a Súdra, nor the Bráhmana (by birth) a Bráhmana: he is ordained O Serpent! a Bráhmana in whom is observed the characteristic, and he in whom the same does not exist must be called a Súdra, &c."—A'jagara-parva, ch. 180.

In the Bhágavat-Gítá a chapter of the same work, the Blessed Lord said,—

चातुर्वर्ण्यं मया सृष्टं गुणकर्मविभागश: । ४, १३ ।

"I created four classes by the different distribution of qualities and actions."—4, 13.

ब्राह्मणक्षत्रियविशां शूद्राणाञ्च परन्तप ।
कर्माणि प्रविभक्तानि स्वभावप्रभवैर्गुणै: ।
शमो दमस्तप: शौचं क्षान्तिरार्जवमेव च ।
ज्ञानं विज्ञानम् आस्तिक्यं ब्रह्मकर्म स्वभावजं ॥

शौर्य्यं तेजो धृतिर्दाक्ष्यं युद्धे चाप्यपलायनं ।
दानम् ईश्वरभावश्च क्षात्रं कर्म्म स्वभावजं ॥
कृषिगोरक्षवाणिज्यं वैश्य कर्म्म स्वभावजं ।
परिचर्य्यात्मकं कर्म्म शूद्रस्यापि स्वभावजं ॥ १८, ४१-४४ ।

"Of Bráhmanas, Kshatriyas and Vaisyas, and also of Súdras, O Enemy-vanquisher, the actions are different by reason of qualities sprung from the state of Self (or soul) : (41). Equanimity, control of senses, austerity, purity, forgiveness, and straightforwardness, knowledge, realisation of knowledge, and belief in next world, are the Bráhmana's action sprung from the state of Self : (42). Bravery, spirit incapable of bearing insult or censure with impunity, fortitude, dexterity, and also not flying from battle, generosity, and commanding disposition, are the Kshatriya's action sprung from the state of Self : (43). Agriculture, cattle-tending and trade are the Vaisya's action sprung from the state of Self : and the Súdra's action, sprung from the state of Self, has the character of service : (44). Gítá—xviii, 41-44.

This revelation by the Blessed Lord ordains that it is not by birth, but by qualities and conduct due to his psychic state determined by the *Adrishta*, that the caste of an individual is determined.

The Bhágavata-Purána called also Srímat-Bhágavata assigns different natural dispositions and qualities to the four castes, and assumes them to be hereditary, as a general rule, but concludes by asserting the possession of the dispositions and the qualities to be the sole test of the caste of individuals, thus,—

यस्य यल्लक्षणं प्रोक्तं पुंसो वर्णाभिव्यञ्जकं ।
यदन्यत्रापि दृश्येत तत् तेनैव विनिर्दिशेत् ॥ ७, १२ ३५

which means,—"Whatever (dispositions and qualities) have been described as the distinctive mark indicative of the caste of a man, if the same are found also in another (*i. e.*, in a person of a different caste by birth), then he shall be designated by that very caste (which is indicated by the qualities, and not by the caste of his descent.)"

This view that qualification is the test of caste, is indicated

in several other passages of this work, one of which is as follows,—

स्त्री-शूद्र-द्विजबन्धूनां त्रयी न श्रुति-गोचरा । १, ४, २५ ।

which means,—"The three Vedas are not fit to be heard by females, Súdras, and *dvija-bandhus*," *i. e.*, male relations of the twice-born, or in other words those males that are descended from the twice-born, but are not themselves so by qualification.

There are also many passages in the Smritis, indicating the possession, by a man, of superior qualities to be necessary for his being a member of the Bráhmana caste in which he is born, and laying down that for certain conduct a Bráhmana shall be reduced to the position of Súdras. The converse case of a person of inferior caste being admitted to the superior rank by reason of endowment with good qualities, appears to be laid down in a few texts which, however, are interpreted by the commentators to be applicable to an exceptional case. See Manu, x, 64-65.

Heredity therefore, is the rule of caste, subject however to a theoretical exception based upon possession or absence of the characteristic qualities. But practically the caste system has become hereditary and has lost the principle upon which it seems to have originally been founded.

Twiceborn and Sudras.—The Smritis, which have thurst into prominence this system, divide men into two large classes, namely, the *Súdras* and the *Twice-born*. The study of the sacred literature forms the principle of this distinction. They ordain that by birth all men are alike to Súdras, and the *second birth* depends on the study of the sacred literature. Thus Sankha one of the compilers of the Dharma-Sástras declares,—

विप्रः शूद्रसमास्तावद् विज्ञेयास्तु विचक्षणैः ।
यावद् वेदे न जायन्ते द्विजा ज्ञेयास्तु तत्परं ॥

which means,—"Bráhmanas (by birth) are, however, regarded by the wise to be equal to Súdras until they are born in the Veda (*i. e.*, learn the sacred literature), but after that (*i. e.*, this second birth) they are deemed twice-born."

Passages to the same effect are found in most of the codes, according to which the recognition of the title of the Twice-born to superiority over the Súdras, depends upon acquisition of the knowledge of the Vedas.

Caste not peacefully established.—The caste system does not

appear to have been peacefully established, in so far as regarded the division of the Twice-born into three castes, namely, Bráhmana, Kshatriya and Vaisya: the Bráhmanical pretension to superiority was resented by the Kshatriyas from the first, when the Bráhmanas appear to have been compelled to admit into their class Visvámitra and his clan who according to them, had been Kshatriyas before. The exaggerated story of Parasuráma the Bráhmanical hero extirpating the Kshatriya race thrice seven times, and the anecdote of Ráma the Kshatriya prince defeating that hero, proves the continuation of the antagonism between the two castes, which is deprecated by Manu (ix, 322) who advised them to cultivate friendly feeling towards each other, not perhaps until after the propagation of Buddhism by a Kshatriya prince, inculcating equality of men, and so striking at the root of the caste system. This compelled the Bráhmanas to reduce their pretensions by promulgating the Tántrikism which was a compromise between the Bráhmanism or caste, and the Buddhism. By their intellectual superiority and monopoly of the Sanskrit literature they have, however, succeeded, by fair means or foul, to maintain their ascendancy to some extent. What turn the system will take, is yet to be seen, now that the people have been emancipated by the benign British rule, from the religious, moral and intellectual thraldom under which they used to labour before.

The number of castes.—It is said that there were originally four castes, namely, Bráhmana, Kshatriya, Vaisya and Súdra; but subsequently the various mixed castes have come into existence by either intermarriage or illicit connection between them and their issue in all sorts of combination, so that we find a distinct caste for each occupation which is said to be its own. This rather leads to the conclusion that most of these mixed castes must have been in existence when the system was introduced, if the occupations be taken to be the guide.

It should, however, be observed that having regard to the differences of character and occupation, the members of every political society are divisible into four classes corresponding to the four castes of the Hindus. Those distinguished by intellectuality, learning and religion are the real leaders of society. Next in importance are persons forming the royal class or the warriors on whom the safety and the very existence of the state depends, and who are characterized by physical agility, courage, administrative capacity and intelligence. Then

come those concerned in the production of wealth by agriculture, trade, and so forth, requiring intelligence and a lower standard of morality. And lastly, the labourers serving the preceding classes or practising the mechanical or similar arts, distinguished by their capacity for physical labour, and spirit of dependence. The virtues and qualities requisite for distinction in these occupations, as well as their importance to society are taken into consideration for fixing the relative rank of the four classes; and the common story of their origin is nothing more than an allegory representing society, and its different classes of members, as one human body and its limbs respectively. The fact that there are as many castes as there are occupations proves the origin of the institution. The explanation of the mixed classes by supposing them to be the issue of inter-marriage appears to be a play of imagination: where the abstract qualities of any two of the four tribes, were thought requisite for filling a particular occupation, persons following that occupation were supposed to be descended from the off-spring of an inter-marriage or illicit connection between a man of the one tribe and woman of the other. Thus the Ambasthas or the members of the physician caste of Bengal are imagined to be a mixed caste sprung from the issue of a Bráhmana father and Vaisya mother: a physician resembles a Bráhmana in his general culture and learning, and also a Vaisya inasmuch as he does in a manner trade with his learning, and so the class is fancied to be mixed of the said two tribes, the worse quality being supposed to be derived from the mother and the better from the father. The number of castes appears to have increased with the increase of occupations, in the course of progress; for, later writers enumerate many that are not mentioned in the earlier works, and they describe the origin of the new castes according to their fancy.

It should be here remarked that the Súdras are not now the lowest class, as is generally supposed; for, all the mixed castes that are deemed to be descended from the issue of a superior mother and an inferior father, are ranked beneath the Súdras. The latest Sanskrit writers on castes say that pure Súdras as well as Kshatriyas and Vaisyas have become extinct. The reason of this assertion seems to be that these Bráhmanical writers do not wish to have two other twice-born castes possessed of privileges like themselves; and as regards Súdras, many castes, which they represent to be mixed ones, appear from their occupations to belong to the Súdra tribe; but the

policy pursued by these Bráhmanas for the purpose of maintaining their own superiority to all, appears to have been to multiply and subdivide castes in such a manner that each of these, though inferior to the sacerdotal class, may deem itself superior to some others, so that the vanity of that caste might be satisfied to some extent. For, although the rank of the four pure tribes is in the order in which they have been enumerated, yet it is difficult to ascertain the exact position of many of the so-called mixed castes in the order regarding the relative rank of castes, having regard to the various combinations of tribes, which the Bráhmanical imagination gives in describing their origin : thus the sense of humiliation which may be felt by a caste at the idea of being inferior to the Bráhmana and the like castes, is compensated by the conceit created by the notion of that caste itself being superior to others.

Sages and Mitakshara and Dayabhaga on intermarriage.—The account of the origin of the mixed castes, as given by Manu and other sages, shows that there were many of them, that sprung from sexual connection between inferior men and superior women. But while dealing with marriage, the sages lay down that marriage between persons of the same caste is preferable, and they also recognise marriage between a woman of an inferior caste and a man of a superior caste to be valid ; but they do not say anything about the marriage between an inferior man and superior woman. There are, on the contrary, passages in the Smritis, providing punishment for a man having sexual intercourse with a woman of a superior class. Thus they do, by implication, prohibit intermarriage between a man of an inferior tribe and a woman of a superior tribe.

The Mitákshará and the Dáyabhága, the two treatises of paramount authority in the two schools respectively, appear to take the same view : for, partition of heritage between sons of a man by his wives of the same and the inferior tribes, is dealt with by the former in chapter I, Section 8, and by the latter in Chapter IX. The Mitákshará also deals with intermarriage in the A'chára Kánda while dealing with marriage.

It should be noticed, however, that these works take into consideration only the four original tribes and not the mixed castes, while they deal with intermarriage or partition.

It should, however, be observed that these prohibitions appear to be of moral obligation only ; hence, although marriage of an inferior man with a superior woman may be

disapproved and condemned, still if such a marriage does in fact take place, the same must be regarded valid as between the parties to it, and the issue legitimate. They may be excommunicated, and excluded from inheritance of their relations (Dáyabhága, XI, 2, 9): but as between themselves the relationship of husband and wife, and of parent and child must be held legitimate and there must also be reciprocal heritable right among themselves,—there being no authority for pronouncing the marriage to be invalid, however reprehensible, the same may be represented to be.

Prohibition of intermarriage by latest commentators.—The latest commentators Raghunandana and Kamalákara, however, prohibit intermarriage between the different tribes, upon the authority of some passages in the minor Puránas, enumerating practices that should be avoided in the Kali age: (See p. 9). But in this respect they differ from the two leading Treatises and the Smritis, which recognize the lawfulness of marriage between a man of a superior tribe and a woman of an inferior tribe. And their view appears to be adopted by the Calcutta High Court which held that a marriage of a Dome Bráhmana with a girl of the Haree caste is invalid, if not sanctioned by local usage: *Melaram* v. *Thannooram*, 9 W.R., 552.

Different subdivisions of the same caste.—There is no text of Hindu law prohibiting an intermarriage of persons belonging to the different subdivisions of the same tribe or *varna*. A practice, however, has grown up, and intermarriage between the different subdivisions of the same tribe do not now take place, although there is no legal bar to the same. For instance, there is no *connubium* between the Bárendra, the Rádhía and the Vaidika subdivisions of the Bengal Bráhmanas, nor between the Bangaja, the Uttara-Rádhíya, the Bárendra and the Dakshina-Rádhíya Káyasthas of Bengal. It is extremely doubtful whether such practice or custom may be the foundation of a rule of law, such as will justify a Court of Justice in declaring an intermarriage in fact to be invalid, when it is not prohibited either by the sages or by the commentators. In the Madras case of *Inderun* v. *Ramaswamy* 13 M.I.A., 141= 12 W. R., P.C., 41, the Privy Council has upheld an intermarriage between two different subdivisions of the Súdra tribe. In the case of *Narain Dhara*, I.L.R., 1 C., 1, there is one passage in the judgment from which it may be inferred that a contrary view of the law was taken. In that case the question was, whether from the fact that a man of the Kaibarta class and a

woman of the Táuti class lived as husband and wife for a period of twenty years, a marriage in fact could be presumed to have taken place between them. And it was held that it could not, inasmuch as the foundation of such a presumption was wanting in that case; for, the parties being members of two different subdivisions of the Súdra tribe, between whom there is in practice no intermarriage, the court could not think it a fact likely to have happened. It was not intended to be laid down that an intermarriage in fact, between different subdivisions of the same tribe is legally invalid; nor did that question arise for decision on the facts of that case. It has, however, been clearly laid down in the case of *Upoma* v. *Bholaram*, I.L.R., 15 C., 708, that such intermarriage is valid.

It should be remarked, however, that what were taken in those cases to be different subdivisions of the Súdra tribe, are represented by the latest writers to be mixed castes.

I may mention to you that in the Eastern Districts such as Sylhet and Tippera, there is a custom of intermarriage between the Vaidyas and the Káyasthas, (*Ram* v. *Akhoy*, 7 W.N., 619), as well as between the Káyasthas and the Shahoos.

Liability and Guardianship for marriage.

Expenses of Marriage-Sanskara or sacrament, charge.— Marriage is the last of the *Sanskáras* or sacramental rites that are ordained to have the effect of purifying the body specially from inherited taint, if any. As regards the females, marriage is declared to be equivalent to Initiation by the investiture with the sacred thread, for which they are disqualified. The performance of this sacrament for both male and female children is an imperative duty imposed on the father, and the expenses for it form a charge on the family property, (Mit., 1, 7, 3 *et. seq.*; D.B., 3, 2, 38 *et seq.*) so that a debt contracted for the marriage of a member is deemed as one contracted for a family purpose, and therefore for the benefit of the family: Mit., 1, 1, 28-29; *Sundrabai* v. *Shivnarayan*, I.L.R., 32 B., 81.

While dealing with the subject of gift, the Mitákshará says that a person having male issue is not competent to alienate his *whole* property, and in support of this proposition, the following text of Smriti is cited,—

पुत्रान् उत्पाद्य संस्कृत्य वृत्तिञ्चैषां प्रकल्पयेत् ।

which means,—"Having begotten sons (the father) shall per-

form the *Sanskáras* or sacraments (including marriage) and shall make provisions for their maintenance."

It should be observed that the father has to perform certain religious ceremonies connected with, and to bear the expenses of, the marriage of sons although the latter are represented in the Smritis to be free agents with respect to their marriage.

Guardianship.—Hindu law does not contemplate marriage of males in their infancy, and so there is no rule regarding guardianship in their marriage. According to Hindu law a man attains majority after the completion of the fifteenth year, and this rule is unaffected by the Majority Act, so far as marriage is concerned ; so a young man of that age is *sui juris* and may be taken to act for himself as regards his marriage.

The Sástras, however, enjoin early marriage of girls, and rules are laid down relating to Guardianship in their marriage. See Texts Nos. 14-16, *supra*, pp. 83-84.

But according to the practice now prevalent among the Hindus, the marriage contract is made by parents for children, so that the bridegrooms also are mere passive agents exercising no volition, their assent to their marriage is only inferred from the absence of dissent.

On a consideration of the texts of Vishnu, Yájnavalkya and Nárada cited above, Raghunandana places the maternal grandfather and the maternal uncle before the mother. But the author of the Mitákshará has adopted the rule laid down in the above text of Yájnavalkya (p.83), without any such addition, probably because cognates are not much thought of in that School. It is worthy of notice that the mother, who is the nearest natural guardian, holds the last place in the above order, although she may, after the death of her husband, give away her son in adoption which affects the interests of the boy given, to the same extent as marriage does those of a girl. There are some reported cases showing that a difference does often arise between the mother and the paternal relations of a girl with respect to her marriage. The latter would prefer a bridegroom who though not wealthy, is member of a family deemed highly honourable according to the artificial rules of *kulinism*, such alliance being conducive to the promotion of the social status of their own family ; whilst the mother would prefer a wealthy and otherwise most eligible bridegroom though belonging to a family of inferior social position according to *kulinism*. (Text No. 19 *supra* p. 84).

In a case of dispute *before* marriage between the paternal

and the maternal relations for guardianship to dispose of a girl in marriage, the Court as representing the Sovereign and as such being the Supreme Guardian, may impose terms upon the relation having the right, for the benefit of the girl, who should not, however, be forced into a marriage odious to her: *Shridhar* v. *Hiralal*, I.L.R., 12 B., 480.

Duty not right.—The above texts, however, appear rather to impose a moral duty on the relations in the order they have been enumerated, enjoining them to provide a suitable match for a girl before her puberty, than to lay down such a strict rule of priority between them as might invalidate a marriage that has actually taken place but not under the superintendence of a relation who, under the circumstances, is the guardian indicated by the above rule. This appears to follow from what both Raghunandana and Kamalákara say, namely, that if the betrothal of a girl is made by her father who is of unsound mind, and thereupon a marriage is celebrated with the usual ceremonies, then the fact of the father's insanity cannot render the marriage invalid

This view of the law on this point, has, subject to certain salutary exceptions, been taken by Justices Norris and Ghose in the case of *Brindaban* v. *Chundra*, I.L.R., 12 C., 140, in which the paternal uncle of a girl impugned the validity of her marriage celebrated by her mother. Their Lordships lay down the law thus: —"There can be no doubt that the uncle of the girl had a right in preference to the mother, under the Hindu laws, to give the girl away in marriage, but the mother, the natural guardian, having given her away, and the marriage having not been procured by fraud or force, the doctrine of *factum valet* would apply, provided, of course, that the marriage was performed with all the necessary ceremonies"

Having regard to the fact that amongst the respectable Hindus it would be difficult to find a man willing to marry a girl who has already passed through the ceremonies of marriage with another man, no marriage should be set aside even in a suit by the girl's father, only upon the ground that it took place without his consent or against his will. For, the sacrament of the marriage rite has the effect of causing the status of wife, unless the same has been vitiated by fraud or force. This view has been adopted by all the High Courts, and the texts relating to guardianship have been pronounced to be directory and not mandatory: See *Venkata* v. *Ranga*, I.L.R., 14 M., 316; *Ghazi* v. *Sakru*, I. L R., 19 A., 515; and *Mulchand* v.

Bhudhia, I. L. R., 22 B., 812. Accordingly, in a case where the mother of a girl married her in disobedience of the order of a Civil Court directing her to make over the girl to her paternal uncle for the purpose of getting her married, it was held by the Bombay High Court that the principle of *factum valet* applied: neither the disobedience of the Court's order, nor the disregard of the preferable claim of the male relations would invalidate the marriage: *Bai* v. *Moti*, I. L. R., 22 B., 509. But the case may be different when a second ceremony of marriage with another man has already taken place at the instance of the proper guardian, which is possible among low castes; and there is a dispute between the two husbands; for, then the Court may take into consideration which of the two marriages is more beneficial to the girl.

Liability of the father and the family property.—Although the aforesaid texts enumerating certain relations having the right or duty in their order, of disposing of maids in marriage, may be held to be of moral obligation only, still there is abundant authority in the Smritis and the Commentaries, for the proposition that the father is legally liable to celebrate the marriage of his maiden daughters, and that the expenses of the marriage of a damsel, and her maintenance until marriage, form legal charges on the property of the family, of which she is a member by birth. See Mit., 1,7; Vir., 2, 1, 21; D.B., 3, 32 *et seq.* Even the daughters of those that are excluded from inheritance, are to be maintained and married at the cost of the family property. It is difficult to understand the principle underlying the view expressed by a Bráhman Judge of the Madras High Court, viz. that under the Hindu Law a father is not under legal obligation to get his daughter married: *Sundari* v. *Subramania*, I. L. R., 26 M., 505. But see I. L. R., 23 M., 512 & 26 M., 497, in which a brother taking by survivorship the undivided coparcenary interest of a *deceased* brother was held liable to pay the expenses of the latter's daughter's marriage.

Betrothal—Marriages are preceded by contracts of betrothal made in more or less solemn form by the guardians of the parties to them. But these contracts of betrothal are not considered to be binding or irrevocable, so as to be capable of specific performance: *Gunput* v. *Rajun*, 24 W.R., 207=I. L. R., 1 C., 74. But damages may be claimed and awarded for the breach thereof: *Purshotam* v. *Purshotam*, I. L. R., 21 B., 23.

Ceremonies.

Marriage Sacrament.—Although marriage itself is dealt with

as the last of the sacramental rites in that part of the Hindu law which is called *A'chára* as distinguished from *Vyavahára* or Litigation, still the marital rights and duties form a subject of litigation; and as this sacrament is preceded by, and founded on, the consent express or implied of either the parties to it or their guardians, the validity of a marriage may be impeached in the Civil Court, upon the ground of the absence of such consent, and of the use of fraud or force in bringing it about; and it may be declared null and void: *Anjona* v. *Proladh*, 14 W. R., 403.

Ceremonies.—I need not enter, in detail, into the numerous ceremonies that are generally observed in marriages, as most of you are aware of them, having passed through the same. But the question that strikes a lawyer is, What ceremonies are essential for the completion of marriage? Let us see what is stated by the writers on the ritual of marriage, as well as the customs on the subject.

The necessary ceremonies according to the works on ritual are the formal gift and acceptance, accompanied by religious rites consisting of the recitation of Vedic texts and the performance of the nuptial Homa called Kusandiká including *saptapadí-gamana* or walking seven steps. It has been held that the Vriddhi-Sráddha is not an essential ceremony; and that if it be proved that the mother made a gift of the bride, and that the nuptial rites were recited by the priest, it ought to be presumed that the marriage was good in law and that all the necessary ceremonies were performed. (See *Brindabun* v. *Chundra*, I.L.R., 12 C., 140). In this case the performance of the ceremony of *saptapadí-gamana* or walking seven steps, was not proved. If the performance of some of the ceremonies usually observed on the occasion of marriage, be proved, a presumption should be drawn that the marriage has been duly completed: *Bai* v. *Moti*, I.L.R., 22 B., 509.

It should however be observed that the religious ceremonies including walking seven steps are not necessary in the marriage of non-virgins, whose marriage therefore, may be performed in a secular mode: Text No. 21, p. 85 *supra*. Accordingly, religious ceremonies do not appear to be performed or deemed necessary in the re-marriage of women who are either widows, or relinquished, deserted or released by their living husbands (*Jukni* v. *Queen Empress*, I.L.R., 19 C., 627; *Vira* v. *Rudra*, I.L.R., 8 M., 440), prevalent amongst the lower castes in all parts of India, under the name of *shunga* or *sagai* in Bengal, *karao* in

the North-West, and *pat* or *nátra* in Bombay. These marriages are instances of the Gándharva form, as they take place by consent of the bride who is presumably a grown up woman. But some customary secular ceremony is performed, such as exchange of garland of flowers or the putting by the man of a red mark of vermillion on the forehead of the bride, in the presence of assembled friends and relations, (*Bissuram* v. *Empress*, 3 C.L.R., 410): and some ceremony is necessary, otherwise it would be difficult to distinguish *Gándharva* marriage from concubinage: (I.L.R., 3 A., 738). The Gándharva marriage does not seem to be obsolete, as it was thought in this case. The Madras High Court has held that in order to constitute a valid marriage in the Gándharva form, nuptial rites are essential : *Brinda* v. *Radha*, I.L.R., 12 M., 72. But in practice, some secular ceremony only is observed in the marriages of widows in the Gándharva form, among lower classes.

The latest commentators unanimously maintain the neces sity of the performance of religious rites for the completion of marriage in all cases including even the Gándharva, although the well-known instance of Sakuntalá's espousal by Dushmanta negatives that view. In order to arrive at a correct conclusion, we must take into consideration the marriages of virgins, non-virgins and widows, and the ceremonies that are common to them. Manu appears to lay down that the essential ceremony for creating the status or marital dominion of the husband is the gift of the damsel by the father or other person having authority in that behalf; (text No. 20, p. 84 *supra*) ; the religious ceremonies being performed for procuring good fortune to the brides. Grown up damsels who have passed the nubile age, as well as widows, are deemed *sui juris* in this respect, and therefore may become self-given, or give their own selves in marriage to men willing to marry them. The secular gift and acceptance of the bride would be sufficient to create the relation of husband and wife between the acceptor and the woman. Even acceptance is not necessary for the completion of a gift, according to the author of the Dáyabhága, who maintains (D.B., 1, 21-24,) that the relinquishment by the donor causes the right of the donee whose non-acceptance would extinguish the right created by the donor's act. In this connection the madman's marriage recognised by Hindu law, should be taken into consideration. Under certain circumstances "Silence is evidence of consent," मौनं सम्मतिलक्षणं, and "What is not dissented from, becomes assented to," अप्रतिषिद्धम् अनुमतं भवति ।

Marriage complete without consummation.—According to Hindu law marriage is a sacrament, and in a religious point of view it causes a permanent indissoluble union of the husband and wife, extending to the next world; and when it has been solemnized with the essential rites prescribed for matrimony the status of husband and wife arises, and the marriage is complete and binding, although it may not be followed by consummation at all: *Administrator* v. *Ananda*, I. L. R., 9 M., 466.

Legal Consequences.

Guardianship.—The effect of marriage is to place the wife under the control of the husband, who is entitled to the custody of her person when she is minor, even in preference to her father, (I.L.R., 17 C., 298). So, when the husband dies and the wife is a minor, her deceased husband's relations are entitled to be her guardian in preference to her paternal relations; (*Khudiram* v. *Bonwari*, I.L. R.. 16 C, 584). But the husband's reversionary heir who is interested in determining her life, should not be appointed the guardian of her person.

Maintenance, residence, &c.—Although the conjugal relation is based upon a contract of either the parties to the marriage, or their guardians, the rights and the duties of the married couple do not arise from any implied contract, but are annexed by law to the connubial relation as its incidents. The wife is bound to reside with the husband wherever he may choose to live. The fact of the husband having another wife will not relieve her from that duty: nothing short of habitual cruelty or ill-treatment will justify her to leave her husband's house and reside elsewhere. (*Sitanath* v. *S. Haimabutty*, 24 W.R., 377.) The duty which the Hindu law imposes on a wife to reside with her husband, wherever he may choose to reside, is a legal and not merely moral duty. An ante-nuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her paternal abode, would defeat that rule of Hindu law, and is invalid on that ground, as well as on the ground that it is opposed to public policy: *Tekait* v. *Basanta* I.L. R., 28 C., 751. Obedience and conjugal fidelity to the husband are duties at all times required of the wife, who is not absolved from marital obligation by apostacy: (I.L.R., 18 C., 264).

The husband is bound to maintain the wife, to provide a suitable place for her residence, and to live with her,

In the absence of any breach of conjugal duties, the wife is entitled to the right of maintenance against the husband personally so long as he is alive, and against his estate after his death. But if the wife resides in her father's house against the will of the husband and without sufficient cause, she cannot claim maintenance while living separate from her husband.

But when the husband habitually treats the wife with cruelty and such violence as to create serious apprehension for her personal safety, she is justified in leaving her husband's protection and is entitled to separate maintenance from him: (*Matangini* v. *Jogendra*, I.L.R., 19 C., 84).

Restitution of Conjugal rights.—If either party is guilty of a breach of the marital duties, the other party may institute a suit against the former for the restitution of conjugal rights: *Surjya* v. *Kali*, I.L.R, 28 C., 37.

There may be circumstances which though short of legal cruelty, may nevertheless bar a suit for restitution of conjugal rights: *Dular* v. *Dwarka*, 9 W. N., 510 = 1 L. J., 283 = I.L.R., 34 C., 971

Unity of husband and wife.—According to Hindu law as well as to many other systems of law, the husband and wife become one person by marriage. Many legal consequences are annexed to this theory of unity of person. Amongst the Hindus this unity is now confined to religious purposes, and does not generally extend to civil matters. The wife can hold separate property, she may enter into a contract with any person and even with her husband, and may sue and be sued in her own name. But the theory that the wife is half the body of her husband, has an important bearing on several points of Hindu law.

According to the Penal Code the husband or the wife does not become guilty of the offence of harbouring an offender by screening each other.

Remarriage of women.—The Hindu sages provide single husbandedness as the most approved mode of life for women; the females that seek religious merit, must not, according to them, ever think of a second husband. But while the Hindu lawgivers thrust into prominence the said high ideal of conjugal duty for women influenced by religious and spiritual aspirations, they do, at the same time, recognize, under certain circumstances, remarriage of women that are impelled by inclination.

Even when her first husband is alive, a woman is allowed to remarry, should she be abandoned by her first husband for

adultery or any other cause, or he be not heard of for a certain period, or adopt a religious order, or be impotent or become outcasted. Thus Nárada (xii, 97) and Parásara (iv, 27) say;—

नष्टे मृते प्रव्रजिते क्लीवे च पतिते पतौ ।
पञ्चस्वापत्सु नारीणां पतिरन्यो विधीयते ॥

which means,—"Another husband is ordained for women in five calamities, namely, if the husband be unheard of, or be dead, or adopt a religious order, or be impotent, or become outcasted." The usage of remarriage of women during the lifetime of their first husband is found to be observed by some low castes, amongst whom the first marriage is dissolved either by a decision of the caste *Puncháyet*, or by the husband's *chhár chithi* or letter of release granted to the wife, who may then contract *sagai* or *niká* marriage with another man: *Jukni* v. *Empress*, I. L. R., 19 C., 627.

Widows.—The Smritis appear to provide three alternative conditions for widows, namely: (1) *sutteeism* or concremation with the deceased husband's body; (2) life of asceticism; or (3) remarriage. The first has been abolished by British legislation. The ascetic life is the alternative adopted by the females of respectable castes, so that amongst them remarriage of women came to be regarded as illegal, although it has all along prevailed among the lowest castes. It did accordingly become necessary to pass the Act XV of 1856 for legalizing the remarriage of Hindu widows belonging to the higher castes, among whom it had become, and still is, obsolete. This statute should properly be called after the name of the late Pundit Iswara Chandra Vidyáságara to whom it owed its origin and who framed its provisions.

Justification of rule against widow marriage.—The Hindu sages recommend that the widows should live a life of austerities, and they disapprove of remarriage of women. This recommendation has been adopted as a rule of conduct by the women of the higher castes, and the rule is justified on the following grounds: (1) Women as constituted by nature, can control and repress the sexual propensity, but men cannot; (2) the number of women is larger than men; (3) there are, no doubt, young widows in Hindu society, but there are not old maids, such as there are in European society; (4) the Hindu system is characterized by justice and equity to women, *all* of whom are *once* married, and they must blame their ill-luck but

not society should they lose their husband; for, they cannot justly claim to have another husband, as in that case so many maidens would be compelled to remain unprovided with husbands; (5) the boasted liberty of widows in European society in this respect, is accompanied by grave injustice to other females who are on that account compelled to live as lifelong spinsters, whose compulsory single condition moves not the vain philanthropists weeping for Hindu widows; (6) remarriage of women undermines the foundation of female chastity, which is the *sine qua non* of the bond, peace and happiness of home; (7) the utility of the institution should be tested by the good secured to the whole society, for the well-being and welfare of which, individual interests are often sacrificed.

Polygamy.—The Hindu law permits a man to have more wives than one at the same time, although it recommends monogamy as the best form of conjugal life. This recommendation has practically been adopted by the Hindus, and monogamy is the general rule, though there are solitary instances of polygamy. This usage, however, cannot but be held just, if the number of women is really larger than that of men. There are various reasons for and against polygamy which is sought to be interdicted by legislation deemed by some as the *panacea* for all evils in India. The Hindu institutions are founded on the requirements of the diversified human nature and condition, and ought not to be lightly interfered with, at the instance of persons distinguished by egotistic sentimentalism and spirit of intolerance. It is far better that those men of property, that are impelled by inclination, should take the responsibility of openly having several wives than that they should secretly contract as many left-handed marriages as they please. The modern legal distinction between public and private character lends only an external whitewash to the social structure of modern times. As to feelings of women, evidence is not wanting that there are females enjoying the liberty conferred on them by Western civilization, who would rather have a half or a quarter of a husband than none at all.

CHAPTER IV.

ADOPTION.

ORIGINAL TEXTS.

१। जायमानो ह वै ब्राह्मणस्त्रिभिर्ऋणैर्ऋणवान् जायते। ब्रह्मचर्येण ऋषिभ्यो, यज्ञेन देवेभ्यः, प्रजया पितृभ्यः। एष वा अनृणो यः पुत्री, यज्वा, ब्रह्मचारी च॥ श्रुतिः।

1. A Bráhmana on being born becomes a debtor in three obligations; to the Rishis (who are propounders of the sacred books) for Studentship (to peruse the same); to the Gods, for Sacrifices; to the Paternal Ancestors, for Progeny: he is free from the debts, who has son, who has performed sacrifices, and who has studied the Vedas.—Revelation.

२। शुक्रशोणितसम्भवः पुत्रो मातापितृनिमित्तकः, तस्य प्रदानविक्रयत्यागेषु मातापितरौ प्रभवतः। न त्वेवैकं पुत्रं दद्यात् प्रतिगृह्णीयात् वा, स हि सन्तानाय पूर्व्वेषां। न स्त्री पुत्रं दद्यात् प्रतिगृह्णीयात् वा अन्यत्रानुज्ञानात् भर्त्तुः। पुत्रं परिग्रहीष्यन् बन्धून् आहूय राजनि चावेद्य निवेशनस्य मध्ये व्याहृतिभि र्हुत्वा अदूरबान्धवं बन्धुसन्निकृष्टम् एव प्रतिगृह्णीयात्, सन्देहे चोत्पन्ने दूरबान्धवं शूद्रम् इव स्थापयेत्, विज्ञायते हि एकेन बहूंस्त्रायते इति॥ तस्मिंश्चेत् प्रतिगृहीते औरस उत्पद्येत चतुर्थभागभागी स्यात् दत्तकः॥ वसिष्ठः।

2. A son sprung from the virile seed and the uterine blood is an effect whereof the mother and the father are the cause; the mother and the father are, therefore, competent to give, sell, or disown him; but an only son should neither be given nor accepted; for, he is intended for continuing the lineage of the ancestors; but a woman should neither give nor accept a son without the permission of the husband. One desirous of adopting a son should after having invited his relations, informed the king, and performed in the dwelling house the *Vyáhriti-Homa,* take one whose kinsmen are not unknown or one who is a near kinsman. But if a doubt arises (as to the caste), then the adopted son whose kinsmen are unknown, should be set apart like a Súdra; for, it is well known that by one many are saved. If after he has been adopted an *aurasa* or real legitimate son be born, then the Dattaka shall be participator of a fourth share.—Vasishtha.

३ । औरसो धर्म्मपत्नीजस्-तत्समः पुत्रिकासुतः ।
क्षेत्रजः क्षेत्रजातस्तु सगोत्रेणेतरेण वा ॥
गृहे प्रच्छन्न उत्पन्नो गूढ़जस्तु सुतः स्मृतः ।
कानीनः कन्यकाजातो मातामह-सुतो मतः ॥
अक्षतायां क्षतायां वा जातः पौनर्भवः सुतः ।
दद्यान् माता पिता वा यं स पुत्रो दत्तको भवेत् ॥
क्रीतश्च ताभ्यां विक्रीतः कृत्रिमः स्यात् स्वयं-कृतः ।
दत्तात्मा तु स्वयं दत्तो गर्भे विन्नः सहोढ़जः ।
उत्सृष्टो गृह्यते यस्तु, सोऽपविद्धो भवेत् सुतः ॥
पिण्डदोंऽशहरश्चैषां पूर्व्वाभावे परः परः ॥

याज्ञवल्क्यः, २,१२८-१३२॥

3. The *aurasa* or real legitimate son is one begotten (by the man himself) on the lawfully wedded wife: equal to him is the appointed daughter's son:—the Kshetraja or appointed wife's son is one begotten on a wife by a kinsman or any other (appointed to raise issue): Gúdhhaja or adulterous wife's son is a son secretly begotten on a wife: the Kánína or damsel's son is a son born of an unmarried daughter, and deemed the son of his maternal grandfather: the Paunarbhava or twice-married woman's son is one born of a twice-married woman, whether her first marriage was consummated or not: the Dattaka son is a son whom the mother or the father gives in adoption: the Kríta or purchased son is one who is sold (for adoption) by the mother and the father: the Kritrima or son made is one who is adopted by the man himself: the Svayandatta or self-given son is one who gives himself: the Sahodhhaja or pregnant bride's son is one who is in the womb of his mother when she is married; and the Apaviddha or deserted son is one who is abandoned (by his parents) and adopted as a son. In default of the first among these the next in order is the giver of the *Pinda* and the taker of the share.—Yájnavalkya, 2,128-132.

४ । माता पिता वा दद्यातां यम् अद्भिः पुत्रम् आपदि ।
सदृशं प्रीतिसंयुक्तं स ज्ञेयो दत्त्रिमः सुतः ॥
सदृशन्तु प्रकुर्य्यात् यं गुण-दोष-विचक्षणं ।
पुत्रं पुत्रगुणैर्युक्तं स विज्ञेयश्च कृत्रिमः ॥ मनुः, ९, १६८-१६९ ।

4. A son equal in caste and affectionately disposed whom his mother or father (or both) give with water at a time of calamity, is known as the Dattrima (=Dattaka) son. A son equal in caste, competent to discriminate

between merit and demerit, and endued with filial virtues, who is adopted (by the man himself), is known as the Kritrima son.—Manu, ix, 168-169.

५। अपुत्रेणैव कर्त्तव्यः पुत्रप्रतिनिधिः सदा ।
पिण्डोदकक्रियाहेतो-र्यस्मात् तस्मात् प्रयत्नतः ॥
पिता पुत्रस्य जातस्य पश्येत् चेत् जीवतो मुखं ।
ऋणम् अस्मिन् संनयति अमृतत्वञ्च गच्छति ॥
जातमात्रेण पुत्रेण पितृणाम् अनृणी पिता ।
तदह्नि शुद्धिम् आप्नोति नरकात् त्रायते हि सः ॥
एष्टव्या बहवः पुत्रा यद्येकोऽपि गयां व्रजेत् ।
यजेत चाश्वमेधेन नीलं वा वृषम् उत्सृजेत् ॥ अत्रिः ।

5. By a sonless person only, should always a substitute of a son be anxiously made, for the sake of funeral oblations, libations of water and obsequial rite. If the father sees the face of a living son after birth, he transfers the debts to him, and attains immortality. As soon as a son is born, the father becomes absolved from the debts to paternal ancestors; on that day he acquires purity, since the son saves from the infernal regions. Many sons are to be secured, if even one may go to Gayá, or celebrate the horse-sacrifice or dedicate a Níla bull.—Atri.

६। देशानान्तु विशेषेण भवेत् पुण्यम् अनन्तकं ।
गयायाम् अक्षयं श्राद्धे प्रयागे मरणादिषु ॥
गायन्ति गाथां ते सर्व्वे कीर्त्तयन्ति मनीषिणः ।
एष्टव्या बहवः पुत्राः शीलवन्तो गुणान्विताः ॥
तेषां तु समवेतानां यद्येकोऽपि गयां व्रजेत् ।
गयां प्राप्यानुषङ्गेन यदि श्राद्धं समाचरेत् ॥
तारिताः पितरस्तेन प्रयान्ति परमां गतिं ॥ उशनाः ।

6. But in particular places the religious merit is endless: it is inexhaustible in a Sráddha at Gayá, and in death and the like at Prayága (or concourse of the Ganges and the Jumna). All those sages sing and proclaim the following verse,—"Many sons should be secured, possessed of good character and endowed with virtue: if amongst them all, even one goes to Gayá, and if having arrived at Gayá perform the Sráddha, the paternal ancestors being saved by the same, attain the highest state."—Usanas.

७ । कांक्षन्ति पितरः सर्व्वे नरकाद् भय-भीरवः ।
गयां यास्यति यः पुत्रः स न स्त्राता भविष्यति ।
एष्टव्या-बहवः पुत्राः यद्येकोऽपि गयां व्रजेत् ।
यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत् ॥ बृहस्पतिः ।

7. All the paternal ancestors apprehending fear of the infernal regions are desirous that that son who will go to Gayá will become our saviour. Many sons should be secured if even one may go to Gayá, or perform the horse-sacrifice, or dedicate the Níla bull.—Vrihaspati.

८ एष्टव्या बहवः पुत्रा यद्यप्येको गयां व्रजेत् ।
यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत् ॥ लिखितः ।

8. This is almost the same as the second verse of Vrihaspati.

९ । अपुत्रेण सुतः कार्य्यो यादृक् तादृक् प्रयत्नतः ।
पिण्डोदकक्रियाहेतोर्नामसंकीर्त्तनाय च ॥
दत्तकमीमांसाधृतमनुवचनं ।

9. By a sonless person, should any description of sons be anxiously made, for the sake of funeral oblations, libations of water, and obsequial rite, as well as for the celebrity of name.—Cited in the Dattaka-mímánsá as a text of Manu.

१० । ऋणम् अस्मिन् सन्नयति अमृतत्वञ्च गच्छति ।
पिता पुत्रस्य जातस्य पश्येच्चेत् जीवतो मुखं ।
अनन्ताः पुत्रिणां लोका नापुत्रस्य लोकोऽस्तीति श्रूयते ॥ वशिष्ठः ।

10. If the father sees the face of the living son on birth, he transfers the debt to the son, and attains immortality. It has been revealed that endless are the heavenly regions for those having male issue but there is no heavenly region for a sonless man.—Vasishtha.

११ । गोत्ररिक्थे जनयितुर्न हरेद् दत्रिमः सुतः ।
गोत्ररिक्थानुगः पिण्डो व्यपैति ददतः स्वधा ॥ मनुः, ९ । १४२ ।

11. The adopted son is not to take away (with him when he is passing from the family of his birth to that of adoption), the *Gotra* and the *Riktha* of the progenitor: the *Pinda* is follower of the *Gotra* and the *Riktha,* the Swadhá (or spiritual food) goes away absolutely from the giver.—Manu, ix, 142.

Gotra is generally rendered into family, but it means here, "the status of being the son :" *Riktha* means wealth, but it means here patrimony or family property, *i e.*, property to which the right of the male issue arises by birth, or to which the right of the boy has already arisen.

Sir William Jones, however, translated the first line of this text thus,—"A given son must never *claim* the family and estate of his natural father," and this version has been accepted by the translators of Sanskrit works on law, in which this text is cited. But this version is misleading, if not inaccurate, implying as it does *future* and not vested right.

१२ । पुत्रान् द्वादश यान् आह नृणां स्वायम्भुवो मनुः ।
तेषां षड् बन्धुदायादाः षड् अदायादबान्धवाः ॥
औरसः क्षेत्रजश्चैव दत्तः कृत्रिम एव च ।
गूढ़ोत्पन्नोऽपविद्धश्च दायादा बान्धवाश्च षट् ॥
कानीनश्च सहोढ़श्च क्रीतः पौनर्भवस्तथा ।
स्वयन्दत्तश्च शौद्रश्च षड् अदायादबान्धवाः ॥ मनुः, ९ । १५८-१६० ॥

12. Manu sprung from the Self-existent has declared twelve sons of men: of these six become *affiliated* or members of the *Gotra* and *Co-parceners* and six become *affiliated* or members of the *Gotra* but not *Co-parceners*. The *aurasa* or true legitimate son, the appointed wife's son, the Dattaka, the Kritrima or son made, the secretly begotten son of the wife, and the deserted son—these six become *coparceners* and *affiliated* or members of the *Gotra*: the maiden daughter's son, the pregnant bride's son, the purchased son, likewise the twice-married woman's son, the self-given son and the son by a Súdra wife,—these six become *affiliated* or members of the *Gotra* but not *coparceners*.—Manu, ix, 158-160.

ADOPTION.

Sons in ancient law.—The usage of adoption is the survival of an archaic institution based upon the principle of slavery, whereby a man might be the subject of dominion or proprietary right, and might be bought and sold, or given and accepted, or relinquished, like the lower animals. The above text of Vasishtha shows that children were absolutely under the power of the father who could give, sell or disown them. The *patria potestas* of the Roman law in its earlier stage furnishes us with a true conception of the father's unlimited power over children in primitive society. Marriage in ancient law, consisted in transfer of the father's dominion over the damsel to the husband. Lifelong subjection was the condition of women who were under the dominion of either the father or the husband or their relations. Male children, however, became *sui juris* on the death of the father and the like paternal ancestors.

A careful consideration of the descriptions of the twelve kinds of sons will give an idea of the primitive conception of

family relationship. The *aurasa* or a son begotten by a man on his own wife is what is now understood by the term son. But the Kshetraja or appointed wife's son was a son begotten on one man's wife by another man who was appointed by the husband or his kinsmen for that purpose. This resembles the usage of Levirate prevalent among the Jews (see the Bible, Book of Ruth, and Deuteronomy xxv, 5-8). The son so produced became the son of the woman's husband. So also was a son whom a wife secretly brought forth by adultery, this son called Gudhhaja became the son of the woman's husband. A son born of an unmarried daughter became the son of the maternal grandfather. The pervading principle appears to have been that a wife and a maiden daughter belonged respectively to the husband and the father, and a son born of them belonged to their owner, in the same way as a calf produced by a cow becomes the property of the owner of that cow. So was the *putriká-putra* or a son of an appointed daughter who was given in marriage to the bride-groom, with the condition that the son born of her would belong to her father, the marriage in such a case did not operate as a transfer of dominion over the damsel, from the father to the husband. Similarly the child in the womb of the pregnant bride was transferred by marriage to the bridegroom. The son of a twice-married woman is now deemed *aurasa* or real legitimate son, but he is enumerated among secondary sons, as re-marriage of women was disapproved by the sages. A man became the father of these seven descriptions of child by the operation of ancient law. It should be observed here that although the Smritis purport to give the above classification of *sons*, it must necessarily include *daughters* as well.

Then come the five descriptions of sons by adoption, *viz.*, the Dattaka and the Kríta are sons given or sold respectively by their parents to a man who takes the boy for affiliating him as a son. The Kritrima and the Svayandatta are the sons made and self-given, they are destitute of parents and therefore *sui juris* and free to dispose of themselves, they become the sons of the adopter with their own consent, the difference between them being that in the case of the Kritrima or son made the offer comes from the adopter, while in the case of the self-given son the offer is made by him. An *apaviddha* or deserted son is one who is abandoned or disowned by his parents and is adopted by a person as his son; this is like the appropriation by the finder of a thing without an owner.

The above descriptions of the divers kinds of sons recog-

nized in ancient times, disclose that sexual relation was very loose, and chastity of women was not valued. The relation of husband and wife, of father and son, and of master and slave, appears to have involved the idea of absolute power on the one hand, and abject subjection on the other, or of the one being the property of the other. Procreation by the father was not a necessary element in the conception of sonship.

The hankering after sons, proved by the recognition of the different kinds of sons, appears to have owed its origin to the exigencies of primitive society composed of families governed by patriarchal chiefs. In the unsettled state of tribal Government in early times, the number of male members capable of bearing arms was of special importance; and the same cause that enhanced the value of sons operated to lower the position of women as well as of men labouring under bodily disability or infirmity such as blindness.

Doctrine of spiritual benefit.—The Hindu society appears to have been civilized by means of religious influence. India is the land of religion, where all conceivable systems of theological doctrines arose and are still prevalent, ranging from polytheism to monotheism and from Sánkhya atheism to Vedántic pantheism. It has no place in the political history of the world, but holds the most prominent position in its intellectual and religious history.

It is erroneous to suppose that the law of adoption owed its origin to the doctrine of spiritual benefit conferred by sons. You cannot associate the sacred name of religion with practices based upon immorality and looseness of sexual relation: there is no system of religion known, that countenances an institution partly founded on adultery, seduction and lust. The Hindu religion which is moulded on asceticism, is least likely to sanction the immoral usages relating to several descriptions of sons recognized by ancient society. As, regards ancestor-worship upon which the erroneous view is founded, its ritual shows that that ceremony is performed not so much for the purpose of conferring any benefits on the ancestors, as for the purpose of receiving benefits from them.

On the contrary, the doctrine of spiritual benefit seems to have been invoked for the purpose of discouraging the institution of subsidiary sons. The Hindu sages who are the propounders of the Smritis or Codes of Hindu law, appear to have introduced the doctrine of spiritual benefit derived from male issue, with the view of suppressing the laxity of marri-

age union, the looseness of sexual morality, the institution of subsidiary sons, and the improper exercise of *patria potestas.* They endeavoured to impart a sacred character to marriage, to impress the importance of female chastity, to discourage the immoral usages of affiliation, and to ameliorate the condition of sons and wives over whom the *pater familias* had absolute dominion extending to the power of life and death.

If you carefully read the passages of the Smritis, extolling the importance of sons in a spiritual point of view, you will find that they all relate primarily to the real legitimate son, and not to the secondary sons. In fact the sages divide sons into primary and secondary, with a view to mark the superiority of the Aurasa or real legitimate son—the primary son. They also divide the sons into two or three groups to show their relative rank : the real legitimate son and the appointed daughter's son are declared to hold the highest position in a spiritual point of view ; to the sons by adoption is assigned a middle rank ; while the sons by operation of law, owing their origin to adultery, unchastity and looseness of sexual relation, are condemned and pronounced to be useless in a spiritual point of view.

Law of adoption simple.—The law of adoption, as propounded in the Smritis and explained in the Mitákshará, the Dáyabhága and similar commentaries respected by the different schools, is very simple. But many useless and arbitrary innovations were, for the first time, introduced by Nanda Pandita in his treatise on adoption, entitled the Dattaka-Mímánsá, composed some time after his Vaijayantí a Commentary on the Institutes of Vishnu, which was completed in Sambat 1679 = 1623 A. D., or a little over a century and a quarter before the establishment of British rule in India. There is no cogent reason why the position of a Legislator should be accorded to Nanda Pandita a mere Sanskritist without law, who had nothing whatever to do with the then government of the country, and the novel rules unfairly deduced by him from a few texts unnoticed by, if not unknown to, all the authoritative commentators most of whom appear to have compiled their works under the auspices of reigning Hindu kings—should be inflicted upon the Hindus as binding rules of conduct. The adventitious circumstance of the work being translated into English at an early period mainly contributed to the notion that it was an authoritative work on adoption, respected all over India ; and this erroneous view originating with the learned translator who assumed it to be an ancient work,

has been often repeated without question, though there is abundant evidence in the reports of cases and records of customs that its peculiar doctrines are not respected in most places. The character of the work has only recently been judicially considered by a Full Bench of the Allahabad High Court presided by Sir John Edge, the Chief Justice, who has in an elaborate and exhaustive judgment dealt with the matter and come to the conclusion that the innovations introduced by Nanda Pandita should not be followed as binding rules The majority of the Judges have concurred in that view, but the minority would follow the maxim *Communis error facit jus*, and hold that the Dattaka-Mímánsá is binding, because it has several times been erroneously asserted to be a work of paramount authority on questions of adoption, although there is neither reason nor rhyme why it should be so regarded. See *Bhagwan Singh* v. *Bhagwan Singh*, I.L.R., 17 A., 294. The Judicial Committee, however, have set aside the view of the majority, and upheld that of the minority, for reasons cited at page 47.

Evidence as to Dattaka-chandrika being a forgery.—I have already told you that there is a well-grounded tradition in Bengal, that the Dattaka-chandriká is a literary forgery by one Raghumani Vidyábhúshana in the false name of Kuvera. The same tradition is also stated in the Tagore Lectures on adoption. But with respect to it, a learned judge of the Allahabad High Court has made the disparaging remark, that "he is not prepared to place any value on," what he erroneously imagines to be, "the story which" the Tagore Professor "has stated" (I. L. R., 17 A., 313). Had the learned Judge glanced at the reference given at the bottom of page 124 of the Tagore Lectures, and procured the book therein referred to, he would have found that the tradition was stated in 1855 A. D., by the greatest Bengali of the nineteenth century. However, it has, therefore, become necessary to set forth the evidence supporting the conclusion that the Dattaka-chandriká is a literary forgery. The evidence consists of the following :—

(1) Sutherland the learned translator, believed that this treatise was not really composed by Kuvera by whom it purports to be written, though he was not informed of the real author.

(2) In 1855 A.D., Pandit Iswara Chandra Vidyáságara published his Disquisition on the Legality of the Re-marriage of Hindu Widows, in both the English and the Bengali languages, and succeeded in inducing the Legislature to pass the Act XV of 1856 for legalizing the re-marriage of Hind

widows. In a note appended to the Bengali version of that work he states to the effect,—that Raghumani Vidyábhúshana composed the Dattaka-chandriká under the false name of Kuvera, and did at the same time, make it known by the acrostic in the last sloka that he was the real author. (See sixth edition of the Disquisition, page 182).

(3) In 1858 A.D., Pandit Bharat Chandra Siromani published in the Bengali character the original Dattaka-Mímánsá and Dattaka-chandriká with his own Sanskrit commentary thereon. He had been a Hindu-law-officer attached to the District Court of Burdwan, and after the abolition of that post, became the Professor of Hindu law in the Government Sanskrit College of Calcutta. While commenting on the last sloka of the Dattaka-chandriká (see *ante* p. 32) he says as follows :—

श्रीरघुमणिविद्याभूषणकृतिरियम् इति प्रसिद्धिः अस्मिन् श्लोके तन्नामोत्कीर्त्तनप्रसिद्धिश्च । प्रथमचरणप्रथमाक्षर-द्वितीयशेषाक्षर-तृतीयप्रथम-चतुर्थशेषाक्षरैः रघुमणिरिति नामोद्धृतञ्च । (see second edition of those works in Deva-nágari character, page 41 of the Dattaka-chandriká) which means,—"It is a widely known tradition that this is the work of Raghumani Vidyábhúshana, it is also a widely known tradition that his name is made known in this sloka; the name Raghumani is given out by the first syllable of the first foot, the last of the second foot, and the first of the third foot, and the last of the fourth foot."

The venerable Pandit, however, adds इदम् अस्मभ्यं न रोचते which means literally,—"This to us is distasteful." The idea is undoubtedly most painful and humiliating that a learned man like Raghumani was guilty of a literary forgery committed for the purpose of perpetrating a fraud upon the court of justice. Assuming that the Pandit means to say that "it is not acceptable to me," yet that does not affect the tradition at all.

(4) The tradition is well known to all Bengali Pandits professing to be *Smártas* or Hindu lawyers. It is curious that the tradition which has all along been so well-known to the Smárta Pandits is unknown to the English-educated native lawyers without Sanskrit.

(5) In 1863 A.D., when I was a student of the Smriti class in the Sanskrit College, I heard it from Pandit Bharat Chandra Siromani who also told the names of the parties to the law suit for which the book was fabricated, and other details including the objects.

(6) The tradition is well-known to the descendants of the litigant parties, of whom the claimant by adoption was to be benefitted by the book. And I have heard it from that claimant's son's daughter's son who was a Vakil of the Calcutta High Court, but is now retired.

(7) The tradition is well-known to the descendants of the family to which Raghumani belonged, and I have heard it from his brother's great-grandson who also told that Raghumani was the Pandit of Colebrooke and was an inhabitant of Bahirgachi in the District of Nuddea.

(8) The case for which the book was fabricated is referred to in Sir Francis Macnaghten's Considerations on Hindu Law; he was the counsel for the adopted son, and as he says that from the law as it was understood at that day, he was certain that his client would have been entitled to *one-third* of the estate, had the cause been not settled by the parties themselves,—therefore it is clear that his attention was not drawn to the book, according to which his client would have been entitled to *one-half*, instead of *one-third*, of the estate. Had the book been in existence at the commencement of the litigation, the counsel for the adopted son the plaintiff, should undoubtedly have known it which is so favourable to his client. The book appears to have been forged subsequently, and it did not become necessary to invite the counsel's attention to it as the case was settled out of Court. The book appears to have been written in the year 1800 A.D.

(9) The book is said to be of special authority in Bengal and yet it was altogether unknown to Pandit Jagannath Tarkapanchánana, whose digest of Hindu law published in 1796 A.D., does nowhere refer to it.

This is not the only instance of literary forgery of the kind. Subsequently in 1832 A.D., some Pandits of the Calcutta Sanskrit College gave a Vyavasthá supported by the authority of certain Manuscript books, in a case between Jainas. (See 5 Bengal Select Reports, page 326, new edition). Those books were really fabricated by the Pandits, but the Librarian of the College was bribed and the books were placed in the Library, and their names entered in the list of books contained therein. The plan was well designed, but unfortunately for them, Dr. H. H. Wilson the then Secretary of the Sanskrit College had in his possession another list of the Library books, and the fraud was detected. As the Pandits confessed their guilt to Dr. Wilson, the only punishment inflicted on them was, that they

were deprived of the source of income derived from giving Vyavasthás, by an imperative rule to the effect that the Pandits of the Sanskrit College shall not, on pain of dismissal, give any Vyavasthá intended to be used in a law-suit. The rule has ever since been in force and followed. Similar fabrications seem to have been made later on, but became unsuccessful: see *Dey* v. *Dey*, 2 Indian Jurist. N.S., 24.

But you must not jump to a general conclusion against the Pandits from these isolated instances. While we find some of these heterodox Pandits, who were considered degraded by reason of teaching the sacred literature to Europeans or by reason of accepting service under them, tempted to deviate from the path of rectitude, we also find many orthodox Pandits possessed of virtues of a superior order, who are on that account respected as gods by the Hindu community. But in these days of Mammon worship, their number is fast decreasing.

The object of adoption—is twofold, the one is spiritual and the other secular: a son is necessary for the attainment of a particular region of heaven, for the performance of exequial rites, and for offering periodically the funeral cakes and the libations of water; as well as for the celebrity of name, and for perpetuation of lineage. Most of the spiritual objects may be attained by a man destitute of male issue through the instrumentality of other relations, such as the brother's son. But the secular object may be gained only by means of a son real or subsidiary. A man again that aims at *moksha* or liberation from transmigration of the soul, does not require a son and cannot adopt one.

Dattaka and Kritrima.—The Dattaka and the Kritrima are the only forms of adoption which are now recognized by our Courts. Of these the Dattaka is said to be in force everywhere; and the Kritrima, confined to Mithilá only. The Kritrima form, however, appears to be prevalent in many districts in Northern India if not also in Deccan.

Putrika-putra.—It is most natural that a person destitute of male issue, should desire to give to a grandson by daughter the position of male issue. The appointed daughter's son is not regarded by Manu as a secondary son, but is deemed by him as a kind of real son. This form of adoption appears to prevail in the North-Western Provinces, and neighbouring districts. The Talukdars of Oudh submitted a petition to Government for recognising the appointed daughter's son; and accordingly in the Oudh Estates Act "son of a daughter treated in all respects as one's own son" is declared to be heir, in default of

male issue. This sort of affiliation appears to be most desirable and perfectly consistent with Hindu feelings and sentiments ; there is no reason why it should not be held valid, when actually made by a Hindu. The Dattaka-Mímánsá appears to have been written on purpose to invalidate the affiliation of a daughter's son, for the benefit of agnate relations.

Sahodha and Paunarbhava.—The pregnant bride's son and the twice-married woman's son are both recognised at the present day, but they are deemed as *aurasa* or real legitimate sons, and not as secondary or subsidiary sons. However it is thus clear that the opinion of the authors of the two treatises on adoption is not respected in this respect.

Division of subjects.—I. Dattaka, II. Kritrima and other forms.

The subject of the Dattaka adoption may be discussed under five heads : (1) who may adopt, (2) who may give away in adoption, (3) who may be given and taken in adoption, (4) what ceremonies are necessary, and (5) what is its effect on the status of the boy.

Dattaka : who may adopt.

Capacity of males.—A consideration of the definitions of twelve kinds of sons, will show that there could not be any restriction as to the number of subsidiary sons in early times, for a man could have a subsidiary son even against his will. There are passages of law, however, which recommended that a man who is destitute of son should make a substitute of son, which evidently discourages adoption by a man having an *aurasa* or real legitimate son. While commenting on these, Nanda Pandita concedes that a man may adopt a son with the consent of an existing *aurasa* son. This recommendation has now been converted into an imperative rule, and its operation has been extended by the Privy Council in the case of *Rungama* v. *Atchama*, 4 M.I.A., 1, holding that a man having an *adopted* son cannot adopt another. If the attention of their Lordships had been drawn to the injunction for securing many sons, laid down in Texts Nos. 5-8 and in passages to the same effect in other Codes, the decision would have been different. Bearing in mind that in Hindu law a son's son and a son's son's son hold the same position as a son, the result is that a man having a real legitimate or an adopted, son, grandson or great-grandson, cannot adopt.

But the existence of a son in *embryo* at the time of adoption

would not invalidate it : *Hanmant* v. *Bhima*, I.L.R., 12 B., 105 ; *Daulat* v. *Ram*, I.L.R., 29 A., 310.

So also the existence of a male descendant who is, by reason of any physical, moral, or intellectual defect, excluded from inheritance and incapable of conferring spiritual benefit, is no bar to adoption.

For, the status of sonship is constituted by the capacity to confer spiritual benefit and by the capacity to inherit : a child who is destitute of these capacities has not the status of son in the eye of the Hindu law.

It would seem therefore that the existence of a son who has renounced Hinduism or has, by becoming a *sannyási* or otherwise, rendered himself incapable of rendering spiritual service, is no bar to adoption. According to Hindu law such a son loses both the capacities constituting sonship ; although the *Lex loci* Act has conferred on such a son the capacity to inherit, yet it cannot be so construed as to deprive the father, of the power of adoption he has in the circumstances under the Hindu law.

A man having no son by his first wife, marries another in the hope of getting a son by the latter. It often happens that the first wife herself, who has failed to become the mother of a son, makes arrangements for her husband's second marriage and induces him to take another wife for the purpose of continuing the lineage and securing spiritual benefit. Such noble self-sacrifice can only be found among Hindu females. However, this second marriage also often proves barren ; and then the man has recourse to adoption. The most natural and reasonable course for him to follow is, to adopt and give a son to each of his two wives, and there are many cases of such double adoption in Bengal. After *Rangama's* case in which successive adoption of two sons was held invalid, the expedient hit upon to evade that ruling was to make simultaneous adoption of two sons for two wives, and there have been many instances of such adoption in Bengal. But simultaneous adoption was pronounced invalid in several cases, though the decision turned upon other grounds and was favourable to the adopted sons. But it has, at last, been judicially held invalid in the case of *Doorga* v. *Surendra*, I.L.R., 12 C., 686, affirmed on appeal by the Privy Council, see *Surendro* v. *Doorga*, I.L.R., 19 C., 513.

It is, however, worthy of special remark that notwithstanding the declaration by our courts of justice, that such adoptions were invalid, the adopted sons have been and are treated by

Hindu society as sons of their adoptive fathers. This anomaly is the effect either of ignorance of the sentiments and usages of the people, or want of sympathy with the same. It is also partly due to the absence of English translation of the texts of law bearing on the subject, which appear not only to permit but to enjoin plurality of adopted sons. See texts Nos. 5-8.

It has been held that a bachelor (*Gopal* v. *Narayan*, I.L.R., 12 B., 329) and a widower (*Nagappa* v. *Subba*, 2 M.H.C.R., 367), may make a valid adoption. In these cases a difficulty arises as to who should be deemed the maternal grand-sires of the boy adopted.

It has also been held that a minor may adopt and give authority to his wife to adopt: (*Rajendro* v. *Saroda*, 15 W.R., 548, and *Jumoona* v. *Bama*, I.L.R., 1 C., 289). It is not clear from these decisions whether it is sufficient for the competency of a minor that he should attain the age of discretion or that he should attain the age of majority according to Hindu law, *i. e.*, complete the fifteenth year. The validity of adoption by a minor is maintained solely on religious ground, and it is looked upon as a purely religious transaction, not affecting the civil rights of the adopter. This view may be quite true in Bengal where it has been held that sons acquire no rights to even the ancestral property during the father's lifetime; but it is not so where the Mitákshará prevails, inasmuch as the adopter's civil rights are materially affected by adoption, for the adoptee becomes the adopter's co-sharer with co-equal rights as regards ancestral property.

So strong, however, is the sentiment of ladies for the continuation of the family and lineage by adoption, especially in those instances in which the extinction of families has been prevented by adoptions, that they take the precaution of having authorities to adopt executed by infants as soon as they attain the age of discretion such as twelve or thirteen years, in favour of their infant wives. They are also made to give verbal permission to adopt, to their wives in the presence of witnesses.

A minor in Bengal under the Court of Wards cannot validly adopt or give authority to adopt, except with the assent of the Lieutenant-Governor, obtained either previously or subsequently.

Pollution on account of the death or birth of a relation does not vitiate an adoption made during it; the secular formalities of gift and acceptance may be performed by a person under it, while the religious part of the ceremony may be

delegated to a priest or a relation free from impurity : *Santap* v. *Rangap*, I.L.R., 18 M., 397 ; *Lakshmi* v. *Ram*, I.L.R., 22 B., 590 ; *Vedavalli* v. *Mangamma*, I.L.R., 27 M., 538, 539.

Capacity of females.—According to the ancient Hindu law as well as to Roman law a woman was placed through her whole life under the tutory of her husband or his agnates when she ceased to be under the paternal power. She was not permitted to be *sui juris* at any period of her life. (See Texts, Nos. 17 and 18 *ante*, p. 84). But important rights were conferred on women by the Mitákshará and the Dáyabhága, so as to make their position almost equal to that of males, specially as regards the right to hold property. A great deal of misconception prejudicial to women, often arises from not distinguishing the later development of law from its earlier stages.

The text of Vasishtha (*ante*, p. 118) provides—"But a woman should neither give nor accept a son except with the permission of the husband." This text has been very differently construed by different schools. See *ante*, p. 33.

Some say that the husband's assent is absolutely necessary for an adoption by a woman. Of these again, some assert that the husband's assent must be given at the very time of adoption, so that according to them a widow cannot adopt at all. While others say that the word "husband" in the above text is illustrative, it means the tutor or guardian of the woman for the time being, that is to say, when the husband is alive his assent is necessary, and after his death the assent of his agnates who are his widow's guardians is necessary and sufficient for enabling her to adopt.

There is a third view entertained by some who maintain that adoption by the widow being conducive to the spiritual benefit of the sonless husband, his assent is always to be presumed in the absence of express prohibition.

It should be observed that according to those who maintain that a widow can adopt with the assent of her husband's kinsman, the husband's assent cannot be operative after his death, on the ground of his not being the guardian of his widow. But this distinction is not practically observed.

The doctrines of the different schools, as enforced by our courts at the present day are as follows :

In Mithilá it is absolutely necessary that the husband should give his assent at the time of adoption ; therefore a widow cannot adopt a *dattaka* son there.

In Bengal the husband's express assent is absolutely necessary and it is operative after his death, so as to enable a widow to make a valid adoption.

The Bengal doctrine has been applied to cases governed by the Benares school.

In Madras, Bombay and the Punjab a woman may adopt either with the husband's assent or with his kinsmen's assent if he died without giving any.

In Bombay widows whose husbands were not members of joint family, may also adopt of their own accord without any assent of either the husband or his kinsmen. It should be observed that in this case the husband's estate is vested in the widow. A widow succeeding to the estate not of her husband but of a *gotraja sapinda* under the rule established in *Lulloobhoy's* case, 7 I.A., 212, cannot make a valid adoption: *Datto* v. *Pandurang*, I.L.R., 32 B., 499.

A Jaina widow also can adopt of her own accord without any authority from either the husband or his kinsmen; the reason perhaps is that she becomes absolute owner of her deceased husband's self-acquired property inherited by her: *Sheo* v. *Dakho*, I.L.R., 1 A., 688; *Manik* v. *Jagat*, I.L.R., 17 C., 518; *Asharfi* v. *Rup*, I.L.R., 30 A., 197.

Nature of woman's right to adoption.—According to what is stated in the commentaries, it would seem that the widow adopts in her own right, but she being in a state of perpetual tutelage, the discretion which she is deemed to want is supplied by the *Auctoritas* of her legal guardian. According to some, the husband is the only guardian of a woman in the matter of having a son; while others regard adoption as an appointment of an heir and disposition of property, and therefore the assent of the husband's kinsmen whose interests are affected, is necessary and sufficient; there are some again who think that the widow inheriting the husband's estate is practically *sui juris* and is also competent to deal with the property for religious purposes, so she may, of her own accord, without the assent of anybody else make a valid adoption which is conducive to the husband's spiritual benefit, and which is an act of self-denial on her part, as by it she divests herself of the husband's estate which vests in the boy adopted.

Present view.—But the modern view regarding woman's capacity to adopt is, that she has no right herself, but that she is deemed to act merely as an agent, delegate or representative of her husband, or that she is only an instrument through

whom the husband is supposed to act: (*Collector of Madura*, 12 M.I.A., 435 = 10 W.R., P.C., 17). It should, however, be observed that the wife is the only agent to whom authority for adoption may be delegated; a man cannot authorize any other person to adopt a son for him. A joint power to the widow and other person or persons is invalid. But the widow's choice of a boy for adoption may be restricted by the husband by requiring the consent of persons named by him. If it turns out that such consent cannot be procured, she has no authority to adopt: *Amrito* v. *Surno*, 27 I.A., 128=I.L.R., 27 C., 996.

Accordingly the "assent of the husband" is looked upon as power. It has been held that a man who has a son in existence, and is therefore himself incapable of adopting a son, may nevertheless give a conditional authority to his wife to adopt a son, to be exercised in the event of the existing son dying without leaving male issue: 7 W.R., 392; I.L.R., 1 M., 174; 22 W.R., 121.

It follows, therefore, that the widow's right of adoption depends entirely on the power, and must accordingly be strictly pursued, *i.e.*, be subject to the restrictions and limitations that the husband may choose to impose in that behalf; *Mutsaddi* v. *Kundan*, 33 I.A., 55. If the widow is authorized to adopt one son, she cannot adopt a second, if the first adopted son dies; if he directs the adoption of a particular boy, she cannot adopt any other. In this manner, the authority is strictly construed. It would, however, be more consistent with the feelings of the Hindus, should the authority given by them be liberally construed, specially when it appears that they evince a general intention to be represented by a son, and a particular intention with respect to the mode of carrying out the same; in such a case, effect might be given to the former irrespective of the latter. This principle has been acted upon in *Lakshmi* v. *Raja*, I.L.R., 22 B., 996, and also in *Suryanarayana* v. *Venkataramana*, I.L.R., 26 M., 681. So also in the recent case of *Kannepalli* v. *Pucha* (33 I.A., 145) where the husband granted to his widow a power to adopt but placed no specific limitation thereto and it was clear that he desired to be represented by a son, it is held that the power was not exhausted by the adoption of one son.

If a person has more wives than one, and authorises one of them, she alone is entitled to adopt. If any other particular direction is laid down, that must be followed; should a general authority to all the wives be given, then there might be some

difficulty in case of disagreement and dispute. But if one is willing to loyally carry out the husband's wishes by adoption and the others are opposed for selfishness, then the former may adopt by giving notice to the latter: I.L.R., 18 C., 69. But all of them may agree in ignoring the authority.

For, however, solemnly a husband may enjoin his wife to adopt a son unto him, she is not legally bound to fulfil his dying request; her rights to the husband's estate are not in the least affected by her omission or refusal to adopt: *Uma Sunduri* v. *Sourobinee*, I.L.R., 7 C., 288.

An authority is void if it directs adoption under circumstances in which the man himself if living could not have adopted.

An authority may be given either verbally, or by a will, or by a writing called *anumati-patra* which must now be engrossed on a stamp paper of ten rupees, and must also be registered; *Mutsaddi* v. *Kundan*, 33 I.A., 55.

Power incapable of execution.—When a widow is authorized to adopt in the event of the death of an existing son, and the son dies, and the estate vests in the son's widow or any heir other than the first-named widow, then the first-named widow cannot adopt, as her power of adoption is then "incapable of execution and at an end," in other words, it is absolutely suspended so as to render an adoption then made absolutely void: *Pudma Kumari* v. *Court of Wards*, 8 I.A., 229=I.L.R., 8 C., 302; I.L.R., 10 M., 205; I.L R., 17 C., 122. But the power revives when the estate reverts to, and becomes vested in her: *Bhoobunmoyee* v. *Ramkishore*, 10 M.I.A., 279; *Manikchand* v. *Jagatsettani*, I L.R., 17 C., 518. But the Bombay High Court has construed that expression of the Privy Council to mean that the power is absolutely extinguished by the vesting of the estate in the son's widow, and cannot revive on the estate reverting to the widow of the donor of the power after the daughter-in-law's death: *Krishna* v. *Shankar*, I.L.R., 17 B., 164. This case is in direct conflict with the decision of the Calcutta High Court, in which an adoption in similar circumstances was upheld as valid, as by making the same the widow divested her own estate only: *Bykant* v. *Kisto*, 7 W.R., 392. It should, however, be observed that in such cases it must be owing to some accident that the son dies without making any provision for the continuation of the family. Having regard to the intention of the sons in such cases, that die making provisions in this respect, and to their feelings on the subject, it is

natural to presume the revival of the mother's power to be what the son would have assented to, had he expressed his views. Such revival appears to be agreeable to the sentiments of the Hindus. Besides, a Hindu widow inherits her husband's estate in the character of being the surviving half of her deceased husband; as soon as she gives up that character by re-marriage her estate comes to an end: her life is deemed as a continuation of her husband s life. Why should then the vesting in the son's widow, of the son's estate, or correctly speaking, the continuation of that estate in her, which had vested in her jointly with the husband since the time of their marriage, extinguish the mother's power; when it is unaffected by the vesting in the son, otherwise than being merely suspended. Moreover, the position of the mother is the same whether she inherits the son's estate just after his death, or after the death of his widow; the estate becomes vested in her as the son's heir in both cases, without any distinction whatever. It is impossible to conceive any reason or principle for difference, with respect to the continuance of the power. Why should it revive in the one case, and be extinguished in the other? It has been held that the son's marriage does not affect the mother's power, if his wife dies before him, and the mother succeeds on his death, she is competent to adopt: *Venkappa* v. *Jivaji*, I.L.R., 25 B., 306. Would it not be arbitrary to hold that she is not competent to adopt, if she succeeds after the son's widow's death?

Hence, that expression must be taken to be used with reference to the actual facts of these cases. The principle underlying their Lordship's decision appears to be that the adoption by a widow is the execution of the power of adoption which is a kind of power of appointment of the donor's estate: *Bai Moti* v. *Bai Mamu*, 24 I. A., 93 = I. L. R., 21 B., 709. If that estate is not ready to drop down on the adopted son at the time of adoption by reason of the same being vested in a person other than the adopting widow, the power must be deemed *non est*, and the adoption void.

Limit to exercise of power by widow.—Having regard to the religious belief and the feelings and sentiments of the Hindus that give to their widows power of adoption to be exercised on failure of male issue by reason of a begotten or adopted son dying after the death of the donor of the power, the question as to the limit of time within which, and the conditions subject to which, the power should be exercised must be

answered thus :—The widow's death is the limit of time within which, and the failure of male issue in the male line, and the vesting of the estate in the widow, are the only two conditions, subject to which, the power may be exercised ; whether the estate vests in the adopting widow just after the death of the son or after the death of his widow, or son, or even grandson, that makes no difference. There cannot be any doubt that the Hindu law on this subject should be enunciated in this manner, if the requirements of Hindu religion and the feelings of Hindus be respected. Is there then "anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law" in allowing a Hindu widow to exercise the power of adoption subject to the said two conditions. The only difficulty in this matter is created by an observation of Lord Kingsdown, founded on an inaccurate view of the requirement of Hindu religion, expressed in these words,—"In this case, *Bhowanee Kishore* (the son after whose death the adoption was made by his mother during his widow's life) had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father."

The law on the subject, could not have been enunciated in the way it was done on the basis of the above view, had it been brought to their Lordship's notice that the same was not the correct view, and that the service absolutely necessary in a religious point of view, which a Hindu son has to perform for his father, and which is ordained as the debt every man owes to his paternal ancestors, is, to leave behind him a male issue for continuing their lineage. The religious belief of the Hindus that the continuation of male issue in this world is necessary for the spiritual benefit of the whole series of the paternal ancestors from the father to the founder of the *Gôtra*,—is exemplified by the account of the interview of Jaratkáru the bachelor ascetic and the *Pitris* or spirits of his paternal ancestors, in the Mahábhárata, A'diparva A'stika-parva, chapter 13, and by the account of Ruchi in the Márkandeya-Purána chapter 95 *et seq.*. The Mahábhárata is a work of the sacred literature embodying the ideals of conduct religious, moral and social, for the guidance of the Hindus, among whom the knowledge of its contents is disseminated in various ways, regarded as religious rites, such as recitation of the original Sanskrit, or impressive speech in vernacular explaining it scontents, both made by learned Bráhmanas. It says that Jaratkáru in the

course of his pilgrimage once met the spirits of his own ancestors in a large pit, suspended with their heads downwards and feet upwards, by one tiny root of a bamboo clump ; seeing them in this plight, he was moved by sympathy and asked them who they were, and wherefore were they in that miserable position ? They said they were the ancestors of one Jaratkáru who was their only descendant on earth, and was leading a bachelor's life practising austerities, and was in consequence not likely to leave a son behind him ; and therefore they must, for want of any male issue after him, fall down very soon from heaven to the earth, and that was the reason of their miserable state. Thereupon Jaratkáru announced himself to them, who told him that he could save them by marrying and begetting male issue. He promised to do so, and did marry and become the father of A'stika, and so the ancestors were saved.

Márkandeya-Purána—which contains the Devi-Máhátmya also called Chandi, the recitation of which is regarded most auspicious,—is another sacred book of the Hindus. It describes a discourse between the (*Pitris*) or spirits of ancestors and Ruchi who had fully subdued all appetites for pleasure, and controlled his senses and led a virtuous life of celibacy. The *Pitris* endeavoured to induce him to take a wife for getting male issue, and when Ruchi raised the objection that it was difficult and hard for a poor old man like himself to get or take a wife, they spoke to him thus :—"Our downfall will assuredly come to pass, O son, and so also thy downward course, if thou dost not welcome our request," (and leave behind you a son). Ruchi was, howe.er, induced at last to marry, and he became father of a renowned son : (Chapters 95-99 ; see Justice Pargiter's English Version, pp. 526 *et seq.*). There are many other sacred books ordaining the necessity of the existence of male issue in this world for the continuance of the heavenly abode of the *Pitris* or paternal ancestors in the male line. Thus it is clear that in a religious point of view, it is a spiritual necessity that the Hindu widow should be allowed to exercise the power of adoption when there is a failure of male issue ; for, it is the existence of male issue for the continuance of the lineage, and not the performance by such issue of any religious rites, which is required for the spiritual welfare of the ancestors. The widow is deemed the surviving half of her deceased husband, and her competency in this respect should be the same as that of her husband enjoining her to adopt on his behalf.

It is unreasonable to suppose that the Lords of the Judicial

Committee would adhere to their observations that partake of the character of *obiter dicta*, when the same were based upon an erroneous view of the religious belief of Hindus. All that has been held by their Lordships, is, that an adoption made by a widow is invalid, if at the time the estate is vested in the son's widow or some other person whose estate she cannot defeat by the exercise of the power. Although there are expressions in the judgments appearing to restrict the widow's power within too narrow limits, such as that "the power is incapable of execution and at an end," when the estate is vested in the son's widow : they are not to be taken literally as if their Lordships were legislating, but should be confined to the facts of the particular cases. Their Lordships themselves observe that the fact of the descent being cast would make no difference "unless the case fell within the authority of that of *Bhoobunmoyee* v. *Ram Kishore*, (10 M.I.A.,279) in which it was decided that the son having died leaving a widow in whom the inheritance had vested, *the mother could not defeat the estate which had so become vested by making an adoption*" : *Raja Vellanki* v. *Venkata*, 4 I.A., 9=I.L.R., 1 M., 186. It has already been shown that there is no difference in the mother's succession, whether she gets the son's estate immediately after the son's death, or after the death of the son's widow who inherits first and after her the mother. It would be arbitrary to say that the mother is competent to adopt in the former case, but not in the latter ; it is absolutely impossible to find any rational principle for such a distinction excepting the view that a married son has exhausted the performance of all the religious services that a son may render to his father,—which must be discarded, as being incorrect : *Ram* v. *Surbanee*, 22 W.R., 121, 123. In this case Mitter J. held that the view taken by the Judicial Committee that a married son exhausted all the spiritual benefit that a son can confer on his father—is supported by no authority, and is contrary to the usages of Hindus : and in the case of *Kannepalli*, 33 I.A., 145, 154, the Judicial Committee have approved of the observations made by Mitter J. on this question.

But, even after this case, the Calcutta High Court thought itself bound to follow the said *obiter dicta* of the Judicial Committee, and to set aside the adoption in a case where the estate had vested in the son's widow, and on her death passed to her mother-in-law who then made the adoption declared invalid by the High Court : *Manikyamala* v. *Nanda*, I.L.R., 33 C., 1306.

That the attainment by a son, after the father's death, of ceremonial competency by marriage, investiture or otherwise before his death, is no bar to adoption, is held by Justice Ranade who explains that the real limitation on a mother's right to adopt is based by the whole current of recent decisions solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others : *Venkappa* v. *Jivaji*, I.L.R., 25 B., 306, 312. In a recent case in which a great number of authorities including this decision were cited, with respect to the effect of the attainment of ceremonial competency, the Judicial Committee observed that they appeared to their Lordships to be rather in favour of than against the validity of the adoption ; but their Lordships did not express any opinion on the question excepting that it is open to controversy : *Verabhai* v. *Bai*, 30 I.A., 234, 237.

In a latter case, (*Ramkrishna* v. *Shamrao*, I.L.R., 26 B., 526) however, in which a widow—whose husband had predeceased his father, and who succeeded to her father-in-law's estate which had devolved at first on her son, and then on her grandson who died unmarried, and lastly on herself as heiress of her grandson,—had adopted a son, three learned Judges of the Bombay High Court have held that the adoption was invalid, relying on the *obiter dicta* of the Privy Council in *Bhoobunmoyee's* case and also in other cases, in which what was actually decided, was, that an adoption made by the mother-in-law when the estate is vested in the daughter-in-law is invalid, and relying also on an earlier case of the same court (I.L.R., 17 B., 164) in which the adoption was made by the mother-in-law who succeeded to her son's estate after the death of the daughter-in-law who had inherited the same at first.

It has already been said that the *obiter dicta* were made under the misconception of the religious ideas and sentiments of the Hindus. There is no reason why the law should not be enunciated consistently with them, in the manner submitted above. If the foundation, namely, the exhaustion of religious services by a son attaining a particular age,—fails, then the whole superstructure of the *obiter dicta* must necessarily fall. And it would not be consistent with the true loyalty and respect due to the Lords of the Judicial Committee to hold that their Lordships laid down an arbitrary rule founded on no principle, and that the same should be adhered to, notwithstanding the rejection of the limitation of ceremonial competency, by reason of the same being inaccurate, which alone did form the principle

of the distinction. It is a question of fact not of law, and the inaccuracy of the view is due to the materials for the right view not being placed before their Lordships. In this connection the following observations made by the Privy Council in an early case, should be borne in mind, namely,—"The interest of sovereigns, as well as their duty, will ever incline them to secure, as far as it is in their power, the happiness of those who live under their government, and no person can be happy whose religious feelings are not respected." *Ramtonoo* v. *Ramgopaul*, 1 Knapp 245=1 P. C. J., 6.

There is no limit of time for the exercise by a widow in whom her husband's estate is vested, of the power of adoption; she may adopt at any time she pleases, when the estate is vested in her. See *Mutsaddi* v. *Kundan*, 33 I.A., 55 and *Giriowa* v. *Bhimaji*, I. L. R., 9 B., 58. But it seems that there must be some limit when the husband's undivided coparcenary interest becomes vested on his death in the surviving male members of the family according to the Mitáksharà.

When widow cannot adopt.—As a widow adopts a son unto her husband, in her capacity of being his surviving half, she cannot adopt after re-marriage; nor when she is pregnant in adultery.

Adoption by infant widow.—As an adoption by the widow divests her of her husband's estate, therefore in an adoption by a young widow, whether infant or not, the court will expect clear evidence that at the time she adopted, she was informed of her rights and of the effect of the act of adoption upon them; and if it finds that coercion, fraud or cajolery was practised upon her to induce her to adopt, or that she was not a free agent, or that there was suppression or concealment of facts from her, it will refuse to uphold the adoption. See *Somasekhara* v. *Subhadra*, I. L. R., 6 B., 524 and *Ranganaya* v. *Alwar*, I. L. R., 13 M., 214.

Adoption by Kinsman's assent.—Where a widow may adopt with the assent of her deceased husband's kinsmen, there if the husband was a member of an undivided family, the assent must be sought from the surviving male members of the family. In such a case the assent of the senior and managing member may be sufficient; but the assent of a divided kinsman will not be sufficient: *Sri Virada* v. *Sri Brozo*, I.L.R., 1 M., 69; *Subrahmanyam* v. *Venkamma*, I.L.R., 26 M., 627. It is not necessary that all the kinsmen should give their assent; the assent of the majority is sufficient in the absence of improper considerations,

such assent should be presumed to have been given on *bona fide* grounds : *Venkata* v. *Anna*, I.L.R., 23 M., 486. The proper person to give the requisite assent is he under whose guardianship the woman should remain according to the circumstances in each case. If there is the father-in-law, his assent is sufficient : *Collector of Madura* v. *Moottoo*, 12 M.I.A., 397=10 W. R., 17 : *Vithoba* v. *Bapu*, I. L. R., 15 B., 110. If the husband was separate, the widow must apply for the assent of the nearest Sapindas, and then it would seem that the consent of the presumptive reversionary heir must be taken : I. L. R., 26 M., 627.

The assent to be legally sufficient should be given after the exercise of discretion, and not from any corrupt motive, I. L. R., 1 M., 69 (82). Where a widow who by representing to her husband's *sapindas* that she had her husband's authority induced them to give their consent to an adoption made by her, but who fails to prove her husband's authority, cannot support the validity of the adoption by the consent of *sapindas* who thought they were only ratifying the husband's authority : *Jonnalagadda* v. *Jonnalagadda*, 34 I.A., 22.

Adoption without assent.—In Bombay a widow in whom her husband's property is vested, may adopt without any authority from her husband or assent of his kinsman, in the absence of express prohibition by her deceased husband, provided she does not act capriciously or from any corrupt motive : *Ramji* v. *Ghamau* I.L.R., 6 B., 498. The husband's assent is presumed from the absence of express prohibition. But when the husband's estate is vested in other relations, she may adopt only with their assent, if the husband gave none : *Payapa* v. *Appanna* I.L.R., 23 B., 327. But acquiescence implied by mere presence at the ceremony and the absence of any objection is not equivalent to consent : *Vasudeo* v. *Ram*, I.L.R., 22 B., 551.

When there are more than one widow, the senior alone may adopt without the assent of the junior widow, but not *vice versa*. The senior widow's preferential right depends on her becoming the *patni* or indispensable associate for religious purposes since her marriage,—a position not affected by subsequent marriage of another wife : *Padaji* v. *Ram*, I.L.R., 13 B., 160.

Dattaka : who may give in adoption.

The father and the mother of a boy are competent to give him away in adoption. The concurrence of both would be desirable. But the father may act even against the will of the mother. The mother, however, cannot give without the assent

of her husband while he is alive ; but after his death she can give her son in adoption, in the absence of express prohibition by her husband, See *Jogesh* v. *Nritya* I.L.R., 30 C., 965= 7 W.N., 871.

Thus you see that there is a great distinction between the giving and the taking of a boy in adoption, as regards woman's capacity in that behalf. Her power is almost unrestricted as regards *gift*, but not so as regards acceptance ; though both seem to be dealt with in the same way, and the assent of the husband is required by Vasishtha (Text No. 2), as well to the *gift* by the wife of a son in adoption, as to the *acceptance* by her of a boy for adoption as son unto the husband.

But as adoption is a kind of advancement of the boy who is to become entitled to a rich inheritance, and as such beneficial to him, it may be safely left to the discretion of a mother to make a gift of her child for adoption, and the father's assent required by the text of Vasishtha may be presumed in the absence of express prohibition.

But a widow has no power, after her re-marriage, to give in adoption her son by her first husband. The Bombay High Court have held that the right to give a boy in adoption is a right of disposition, a portion of *patria potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, but which is lost by re-marriage ; I.L. R., 24 B., 89. The capacity to give may also be regarded as an incident of guardianship which she loses by re-marriage. But in a recent case the Bombay High Court have held that where the husband authorized his widow to give their son in adoption, the widow can make a valid gift in adoption even after her re-marriage : *Putlabai* v. *Mahadu*, I.L.R., 33 B., 107.

As regards the gift of an only son, the effect of which would be the extinction of the family, and the cessation of spiritual benefit derived from the son, it is doubtful whether this presumption of assent in the absence of express prohibition, can legitimately be made in such a case. This appears to be the principle of the distinction, upon which Sir Michael Westropp's view is based, namely, "that assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law." But if the father was poor, he may be fairly presumed to have preferred the son's secular benefit by adoption, to the spiritual benefit of himself and his ancestors. And the mother's action in this respect may be taken to be

governed by the same considerations, as that of the father. The attention of the Judicial Committee seems to have not been directed to the principle underlying the distinction which is therefore pronounced by their Lordships to have been quite novel. And their Lordships approved of the view expressed by the Madras High Court that the wife's power, at least with the concurrence of *Sapindas* in cases when that is required, is co-extensive with that of the husband : *Sri Balusu* v. *Sri Balusu*, 26 I.A., 113, 128. But it should be observed that in this case there was the requisite assent to enable the mother to make the gift; for, according to the guardianship theory adopted in Madras, the husband's kirsman's assent is sufficient.

Considering the consequences of adoption which appears to operate as civil death of the boy as regards the family of his birth, the law confers on the parents only, the power of making a gift in adoption. A stepmother, or any other relation, cannot make such a gift : *Papamma* v. *Venkatadri*, I.L.R., 16 M., 384.

Nor can the parents delegate this power to any other person. But the gift and acceptance form the essential part of the ceremony; if the parents have performed the same they may delegate the religious portion to any relation or to their priest for performance and completion of the adoption : *Lakshmi* v. *Ram*, I.L.R., 22 B., 590. When a Bráhmana died after having taken a boy in adoption, but died before the ceremony of the Datta-Homam was performed, and the same was performed by his widow, the adoption was held valid : *Subba* v. *Subba*, I.L.R., 21 M., 497.

The power which the Hindu law confers on a father to give away his son in adoption is not lost by a Hindu pervert to Islamism. If he thinks it beneficial to his son to remain a Hindu, and to be adopted as a son to a Hindu adopter, he is competent to give away the son in adoption. He may be a party to the secular gift and acceptance, and delegate to a relation the performance of the religious portion of the ceremony of adoption. In a case in which the natural father after having adopted the Mahomedan religion was desirous to give his son in adoption and authorized his Hindu brother to make the gift, and then died, and subsequently the boy was given by his said uncle, it has been held that the father was competent to delegate the authority, and the adoption was good: *Sham* v. *Santa*, I.L.R., 25 B., 551. On the same principle it has been held that a Hindu becoming a *Bráhma* may give his

son in adoption, the religious ceremony being performed by a Hindu relation; the son is entitled to revert to Hinduism with the father's consent: *Kusum* v. *Satya*, I.L.R., 30 C., 999= 7 W. N., 784.

Dattaka: who may be given and taken in adoption.

Only son.—With respect to eligibility for adoption, the only rule on the subject, propounded by the well-known legislators, is the prohibition contained in the above text No. 2 (*ante*, p. 118) of Vasishtha, forbidding the adoption of an only son. This rule is merely recommendatory in character, and it was held to be so by all the superior courts in India till 1868 A.D., when for the first time, it was held by a Division Bench of the Calcutta High Court that the adoption of an only son is invalid. One of the Judges was Justice Dwarkanath Mitter, but being a "lawyer without Sanskrit" he was not in a better position than the European Judges holding the contrary view, as regards the interpretation of Hindu law See *Raja Opendur* v. *Ranee Bromo*, 10 W.R., 347; and I.L.R., 3C., 443. The Bombay High Court also had, since that decision, been expressing their opinion against the adoption of an only son till a Full Bench of that Court did in 1889 A.D., hold such adoption to be invalid: *Wâman* v. *Krishnáji*, I.L R, 14 B, 249. But such adoption has all along been held valid in Madras. N.-W. Provinces and the Punjab. In 1892, a Full Bench of the Allahabad High Court did, upon a reconsideration of the law and the previous cases, come to the conclusion that the adoption of an only son is valid: see *Beni Prasad* v. *Hardai Bibi*, I.L.R., 14 A., 67. The very fact of there being so much difference of opinion, proves the rule to be of moral obligation only.

But this controversy has been set at rest by the decision of the Judicial Committee holding the adoption of an only son to be valid: *Sri Balusu* v. *Sri Balusu*, 26 I.A., 113. This view is perfectly consistent with what is deducible from the Sanskrit works on law; and it is due to misapprehension of their meaning, that some learned writers maintain the contrary view.

Some other similar rules held admonitory.—There are some commentators who say that a man should not give away his son in adoption when he is not in distress, and that he should not give in adoption his eldest son or one of two sons. But these are considered to be merely directory and not imperative.

The Dattaka-mímánsá and still later commentaries say that a man should adopt his brother's son if available for adoption,

in default of him he should adopt a *sapinda*, in his default a *Samánodaka*, and in default of an agnate relation he should take one belonging to a different *gotra* or family. But this rule relating to preference in selection has been held by the Privy Council to be merely recommendatory: *Wooma Dace* v. *Gokoolanund*, I.L.R., 3 C., 587.

Prohibition of certain relations for adoption by twice-born classes.—Nanda Pandita and his followers maintain that certain relations such as a brother or an uncle, or the son of a daughter, or of a sister, or of the mother's sister, or the like, should not be adopted by a twice-born person. No such rule is laid down in any earlier commentary. Nanda Pandita deduces the rule from two texts of doubtful import, which are not noticed by any commentator of note, and one of which is said to be a text of Saunaka and the other of Sákala, neither of whom is recognized as legislator, and whose names are not found in most of the commentaries on positive law. The texts are as follows:—

(1.) दौहित्रो भागिनेयश्च शूद्रैस्तु क्रियते सुतः ।

ब्राह्मणादि-त्रये नास्ति भागिनेयः सुतः क्वचित् ॥ शौनकः ।

which means,—"A daughter's son and a sister's son are made sons by *Súdras*: among the three tribes beginning with the Bráhmana, a sister's son is not (made) son somewhere (or anywhere)."—Saunaka.

The second line of this couplet is not found in many copies. This passage is found, in a book on ritual, the authorship of which is attributed to Saunaka, but which on perusal would appear to be a modern production. It does not profess to deal with law; but while dealing with the ritual of *Játa-karma* or the natal ceremony, it professes to describe the ritual of adoption, and the above passage and some others relating to adoption are found after the description of the said ritual. In the course of describing the ritual, it is said after the formal gift and acceptance have been completed, that the boy *bearing the reflection of a son* पुत्रच्छायावह should be adorned &c., and brought within the house where *homa* should be performed.

(2.) सपिण्डापत्यकञ्चैव सगोत्रजमथापि वा ।

अपुत्रको द्विजो यस्मात् पुत्रत्वे परिकल्पयेत् ।

समानगोत्रजाभावे पालयेत् अन्यगोत्रजं ।
दौहित्रं भागिनेयञ्च मातृस्वसृसुतं विना ॥ शाकलः ।

which means,—"A sonless twice-born man *shall* or *should* adopt, a son of a *Sapinda* or also next to him a son of a *Sagotra* ; and in default of the son of a *Sagotra, shall* or *should* adopt one born of a different *gotra,* except the daughter's son, the sister's son, and the mother's sister's son."—Sákala.

From what book of Sákala's these lines are quoted by Nanda Pandita, or whether Sákala is the author of any book, no one can tell.

From the above couplets of Saunaka and Sákala and the words "*bearing the reflection of a son*" qualifying the boy, Nanda Pandita deduces the rule that amongst the twice-born classes such a boy should be adopted, as could be begotten by the adopter on the boy's mother by appointment to raise issue in the Kshetraja form, and accordingly he prohibits the adoption of the relations mentioned above.

Sutherland, the learned translator of the Dattaka-mímánsá and the Dattaka-chandriká, formulates the rule thus,—That a twice-born man cannot adopt a boy when the relationship between the boy's mother and the adopter is such that there could have been no valid marriage between the adopter and the boy's mother, had she been unmarried. This, however, does not correctly represent Nanda Pandita's view ; for, this rule cannot exclude the relations whom he has expressly excluded.

Discussion as to there being any such binding rule.—If what Nanda Pandita says be accepted as authoritative and imparative, then the utmost that can be said is, that the relations to be avoided are only those enumerated by him. If on the other hand, it be open to us to examine the texts with a view to see whether there is any binding rule prohibiting the adoption of any relation, then the question cannot but be answered in the negative, as has been done by the Full Bench of the Allahabad High Court (I.L.R., 17 A., 294), for the following reasons :—

(1) The above text of Saunaka does not embody any command or चोदना in the language of the Mímánsá but it is merely a statement of facts, or what is called in Sanskrit a अर्थवादः । As regards the words "*bearing the reflection of a son*" forming an adjective of the boy who has already been formally given and accepted, they can fairly be taken to indicate only

the effect of the ceremony already performed; but they can by no means imply the meaning forced upon them by Nanda Pandita, who has rather evolved it out of his inner consciousness, than from the natural import of the words.

(2) Then, as to Sákala's text, it should be observed in the first place, that the object of the text is not to lay down who should or should not be adopted, but to declare who should be adopted first, who next, and who last: or in other words the order of preference in the matter of selecting the boy to be adopted. It says, you *shall* or *should* adopt from amongst the *Sapindas*; in their default, from amongst the distant *Sagotras* or agnates; and in default of agnates, from amongst those belonging to a different *gotra* such as cognates; then follows the exception, "except the daughter's son, the sister's son, and the mother's sister's son." Now the question arises, to what does the exception relate? It admits of two constructions, one of which is logical (अर्थविषया), and the other grammatical (शब्दविषया).

If the text be construed *logically* or having regard to its true intention, the rule may be put thus—"If a *Sapinda* is available for adoption you *shall* or *should* not adopt a distant *Sagotra* or agnate; and if an agnate is available for adoption you *shall* or *should* not adopt one belonging to a different *gotra* or family, except the daughter's son, the sister's son, or the mother's sister's son,"—that is to say, the daughter's son, the sister's son, and the mother's sister's son, though belonging to a different *gotra*, may be adopted although there may be an agnate available for adoption: thus, the exception relates to the *order* which is the subject of the rule. And this construction is consistent with what is laid down by all the sages dealing with positive law. For, they recognize the twelve kinds of sons; therefore a daughter's son may according to them, be the son of the maternal grandfather, as *Putriká-putra* or appointed daughter's son, or as *Kánína* or maiden daughter's son. Hence there is no reason why the same daughter's son cannot be his maternal grandfather's son as *Dattaka* or given son. Therefore, consistently with what is necessarily implied by these well-known legislators, Sákala cannot be taken to prohibit the adoption of "the daughter's son" who has been declared to be most eligible as a subsidiary son under the name of *Putriká-putra* declared to be equal to the *Aurasa* or real legitimate son,—and consequently, of "the sister's son and the mother's sister's son."

Next, if the text be construed *grammatically*, then the ex-

ception is to be connected with the verb "*shall* or *should* adopt," and the text must be put thus: "In default of an agnate, he *shall* or *should* adopt one belonging to a different *gotra* except (or but not) the daughter's son, the sister's son, and the mother's sister's son,"—therefore the prohibitory proposition or sentence must *grammatically* be formed with the verb "*shall* or *should* adopt" as used in the text, and must stand thus,—"But he *shall* or *should* not adopt the daughter's son, the sister's son, and the mother's sister's son."

It should, however, be borne in mind in this connection, that the Privy Council have declared the rule propounded by Sákala relating to the order of preference, to be directory only, I.L.R., 3 C., 587. Therefore, although the word पालयेत् in Sákala's text may, having regard to its form, mean either "*shall* or *should* adopt." It must now be taken to mean "*should* adopt:" consequently, the very same word पालयेत् or "*should* adopt" being grammatically connected with the exception, the prohibitory sentence must mean, "But he *should* not adopt the daughter's son, the sister's son, and the mother's sister's son"—that is to say, the exception also must be a precept of moral obligation, like the rule. In this connection the following Sanskrit rule of construction should be borne in mind, namely सकृदुच्चरितः शब्दः सकृदर्थं गमयति or "a word once pronounced can convey only one meaning:" hence, although the word पालयेत may mean either "*shall* adopt" or "*should* adopt," it being authoritatively settled by the decision of the Privy Council that it means "*should* adopt" in connection with the rule, it cannot but bear the same meaning when grammatically connected with the exception.

This interpretation appears to be unexceptionable and unassailable from a Sanskritist's as well as a lawyer's point of view: its correctness, however, depends upon the view adopted by the Privy Council, of the rule relating to the order of preference for adoption. And the view taken by the Judicial Committee appears to be supported by the Mímánsá. Those who feel curiosity to study the subject with details, are referred to Jaimini's Mímánsá with Savara-Svámi's Bháshya, Ch. I, Pada or Section 2, and Ch. XI, and specially to विधिवन्निगदाधिकरणम् or "the topic of recommendations in the form of imperative rules," Ch. I, 2, 19 *et seq.* In this topic is discussed the question, whether precepts like the following are imperative or only recommendatory, namely, औदुम्बरो यूपो भवति, &c., or "A sacrificial post is made of (the wood of) the Udumvara tree, &c.:" and the conclusion arrived at is, that it is merely recommendatory, one of the reasons assigned being

विध्यसम्भवश्च स्तुतिसम्भवश्च—"the improbability of the precept being imperative, and the probability of its being a recommendation." A sacrificial post is but a means to an end, it is necessary for tying the animal to be sacrificed ; any strong wood would be sufficient for the purpose, therefore the above precept is interpreted to be a recommendation only. Similarly, an adopted son is only a means to an end, and the direction that a brother's son if available should be adopted. in his default a *Sapinda*, and so on,—is, for similar reasons, merely recommendatory. The truth is, that there are various reasons for considering a rule to be recommendatory only (अर्थवादः or प्रसज्यप्रतिषेधः) and not imperative (विधिः or पर्युदासः),—हेतुवन्निगदः or "a precept with the reason for it," being only one of the tests for discriminating it as directory : and it is impossible for an unbiased and unprejudiced mind that is versed in Sanskrit law, to find fault with the rational view taken by the Privy Council, of the rule relating to the order of preference for adoption, and with its corollary that the exception to it is of the same character with the rule, having regard to the language of the text, and to the rules of construction.

(3) It is conceded that the adoption of the daughter's and the sister's son is valid amongst the *Súdras*. From this it may, according to Sanskrit rules of construction, be, very fairly inferred that such adoption amongst the twice-born classes is only censured, and not absolutely interdicted. But the Bombay High Court, relying on a hasty conclusion come to by Sir Raymond West, an eminent Judge and Sanskritist, gets rid of that circumstance by observing that "the Hindu Law regarded the *Súdras* as slaves, and their marriages as little better than concubinage": see I.L.R., 3 B., 273 (289). With great deference to Sir Raymond, I regret to say that the above proposition is entirely erroneous ; for, the Smritis or Codes of Hindu law did not regard the *Súdras* as slaves, and their marriages as concubinage.

According to the Smritis, every man is by birth a *Súdra* ; it is by learning the sacred literature, that a man becomes twice-born. The privilege of studying the sacred literature is, no doubt, denied to the *Súdras* as well as to the females of the so called twice-born classes. But the status of being *twice-born* depends on the acquisition of knowledge of the sacred literature. Manu (Ch. III, verse 1) ordains that a twice-born man shall abide with the preceptor, and study the Vedas for thirty-six years, or a half or a quarter of that period, or until know-

ledge of the same is acquired. The consequence of omitting to do the same is thus declared by Manu (Ch. II, 168):

योऽनधीत्य द्विजो वेदम् अन्यत्र कुरुते श्रमं ।

स जीवन्नेव शूद्रत्वम् आशु गच्छति सान्वयः ॥ मनुः २, १६८ ।

which means,—"That twice-born man, who without studying the Vedas, applies diligent attention to anything else, soon falls even when living, together with his descendants, to the condition of a *Súdra.*" Hence the males of the twice-born classes, who have no knowledge of the sacred literature, are like their females, in the same category as *Súdras, i. e.,* they remain such as they are by birth. The majority of the so-called twice-born classes have accordingly become long since reduced to the position of *Súdras* by reason of neglecting the study of the Vedas from generation to generation. It follows, therefore, that according to the Smritis, the *Súdra* law should be applicable to them who are twice-born by courtesy only, and hold the position of *Súdras.* Our Courts of Justice are called upon, therefore, to enquire, in every such case, whether the so-called twice-born litigants are really so, before applying to them a rule different from that applicable to the *Súdras*; and in ninety-nine cases out of a hundred, it will be found that the parties, though twice-born by courtesy, are really *Súdras* by qualification. There are, no doubt, some modern fabrications called *Upa Puránas,* and concocted for the purpose of avoiding the foregoing evil consequence propounded by the Smritis,—which say that the study of the Vedas for a long time is a practice which is to be eschewed in the Kali age (see *ante,* p. 9), and accordingly a farce of the Vedic study for a day or two, is now made when the *Upanayana* ceremony is nominally performed, and fittingly called investiture with the sacred cord, though it really meant commencement of the study of the Vedas, the literal import being *taking* (a boy and handing him over) *to* (a teacher of the Vedic literature). But these spurious books forged and thrust into prominence by the Pandits of the Mahomedan period for the benefit of the unlearned members of their class, cannot be regarded as any authority by a British court of justice. The *Puránas* and specially the *Upa-Puránas* are no authority in law. The Courts of Justice are to be guided by the Smritis and the ancient customs only, as is declared by Yájnavalkya (ii, 5) while defining a *cause of action,* thus—

स्मृत्याचारव्यपेतेन मार्गेणाधर्षितः परैः ।

आवेदयति चेद् राज्ञे व्यवहार-पदं हि तत् ॥ याज्ञवल्क्यः २,५ ।

which means,—"If a person wronged by others in a way contrary to the Smritis or the customs, complains to the king, that is a topic of litigation (or cause of action)." Our courts of justice, if rightly advised, will not listen to an unreal distinction, although the degenerate Bráhmanas by courtesy might be loudest in advancing their pretension to a false and artificial superiority

A perusal of the Smritis will convince the reader that the *Súdras* as such were not regarded as slaves. Any person whether *Bráhmana* or *Súdra* might be a slave in the recognized modes such as capture in war, or sale by the father ; (see Manu viii, 415). While dealing with the modes of acquiring subsistence by the different classes, Manu says, that a *Súdra* is to subsist by serving the twice-born classes, or by the practice of mechanical arts. But is this service the same thing as slavery? Not a word to that effect can be found in the Smritis, though no doubt the holders of service are compared to dogs, to whatever caste they may belong. There is however, a passage in the *Brahma-Purána*, which depicts the *Súdras* subsisting by service, as slaves, and that is the only slender basis on which is founded the conclusion that the Hindu Law regards the *Súdras* as slaves. But that passage does not apply at all to the *Súdras* practising the mechanical arts. Besides, slavery has been abolished within living memory, although the importation of slaves into British India, and the recognition of slavery by Government officials, were prohibited by earlier Enactments: slavery was abolished in 1860 A.D. by the Indian Penal Code. Therefore if the position of *Súdras* had been that of slaves under the Hindu Law, that state of things would have continued down to the abolition of slavery ; but has any one ever heard that the general body of the *Súdras* or any section of them was *then* emancipated ? The British Government has undoubtedly emancipated the people from moral thraldom. But no particular caste of Hindus was under physical thraldom at the time slavery was abolished, though there were certainly some Hindu slaves whose caste is unknown, that were liberated by British Indian legislation.

The Hindu legislators were anxious to provide every man with a source of maintenance ; accordingly they ordained that

the illegitimate son of a twice-born man by a *Súdra* woman not married by him, is entitled to maintenance from his estate, and as regards *Súdra* they provide that an illegitimate son may, by the *Súdra* father's choice, get an equal share with a real legitimate son of his, and that after his death, he is to get a half share in comparison with what is obtained by his legitimate brothers ; and that in default of legitimate heirs down to the daughter's son, he may get the whole property. Now it should be observed that *Súdras* were all poor men at the time when the above rule was laid down: the only property they might leave behind them would be a dwelling house, and if he practised any mechanical art, also the tools of such art. Consequently a *Súdra's* illegitimate son by getting even his whole property, obtained considerably less than a Bráhmana's illegitimate son who was entitled to maintenance. It is difficult to appreciate the process of reasoning by which, from the above provisions for the benefit of a *Súdra's* illegitimate son, any inference can be drawn that the marriages of *Súdras* are licensed concubinage. Yet that is the only ground upon which that remark of Sir Raymond's is founded: there is nothing else in Hindu Law, which can even remotely lend any support to such a disparaging view as that. If we turn our attention from the law-books to the actual usage amongst the Hindus, we do not find anything peculiar to the *Súdras*, that may justify that contemptuous conclusion. On the contrary, having regard to the actual practice, the disparaging remark might be applied to marriages among the Nair Bráhmanas in Deccan; and also among a certain section of Bengali Bráhmanas by courtesy, who used to pass through the ceremony of marriage with scores of women, some times exceeding a hundred, though they were too poor to provide even one of them with maintenance and residence.

Besides, it is difficult to understand the logical sequence between the adoption by *Súdras* of their daughter's and sister's sons, and the fact (even if admitted to be correct) of the Hindu Law regarding *Súdra* marriages as concubinage. If the Hindu Law had provided no prohibited degrees for marriage amongst the *Súdras*, and had allowed them to marry their daughters and sisters, then and then only could the distinction have been accounted for in the manner attempted to be done. For, in the prurient imagination of Nanda Pandita and the like, the adopted son is to be capable of being begotten by the adopter on the son's natural mother, by appointment to

raise issue, merely for the purpose of justifying the prohibition propounded by him, for the first time.

For, even according to him, the fiction of adoption, is not, that the boy is begotten by the adopter on the boy's natural mother. Because if that had been so, the boy ought to have retained his relationship to his natural mother and her relations. On the contrary it is admitted on all hands, that the real fiction of adoption is, that the boy is begotten by the adopter on his own wife, and it is on that footing that the adopted son's right of inheritance from the adoptive mother and her relations has been recognized, and that from his natural mother and her relations, denied to him. In performing the Párvana Sráddha he is to offer *pindas* or oblations to his adoptive mother's sires, not to those of his natural mother: see Dattaka-Mímánsá vi, 50. So the prohibition is utterly inconsistent with this theory of adoption, now universally accepted.

(4) There is a text of Yama, which appears to support the adoption by a twice-born person, of his daughter's son :—

दौहित्रे भ्रातृपुत्रे च होमादिनियमो न हि ।
वाग्दानादेव तत् सिद्धिरित्याह भगवान् यमः ॥

which means,—"The Homa or the like ceremony is not (necessary) in the case (of adoption) of the daughter's or the brother's son ; by the verbal gift (and acceptance) alone, that is accomplished : this is declared by the Lord Yama."—This text was relied on by some Sástris of Bombay in 1821 A.D., who were consulted in the case of Huebut Rao, 2 Borrodaile 75, (85). I have not found it cited in any commentary of note; but Pandit Bharat Chandra Siromani used to repeat it to his pupils, and it is also cited in some unimportant works on adoption, see the said Pandit's compilation, called Dattaka-Siromani, pp. 45, 92, 244 and 246. This text, however, is not found in the Code of Yama, such as is now extant and published; it does not contain a single passage on positive law; nor do the published Codes of Vrihaspati and Kátyáyana, although numerous texts from them are cited by commentators on positive law, none of which is found in the published editions. Another text of Yama, cited in the Dáyabhága, Ch. XI, Sec. 5, para. 37, was the subject for consideration by a Full Bench of the Calcutta High Court (I. L. R., 1 C., 27), and the learned judges were anxious to see the context for the purpose of ascertaining the true meaning of that text (I. L. R., 1 C., 38), and I was consulted and asked by an

eminent judge of that Bench to procure the Code of Yama. I saw Pandit Bharat Chandra Siromani on the subject, but he said that the complete Code of Yama containing the chapter on positive law, he had never seen, and could not be found anywhere, so far as he was aware. Hence the above text can not be supposed to be spurious, simply because it is not found in the published incomplete Code of Yama; it seems to have been traditionally known in the Sanskrit law-schools, when we find it cited by the Bombay Sástris and a Bengali Pandit.

Nor can it be contended that this text of Yama should be construed to refer to the *Súdras* only, and not to the twice-born classes. Because, in construing passages of law, we must take into consideration the religious disability of the *Súdras* under the Codes, to whom the privilege of performing sacrifices was denied, see Jaimini's Mímánsá (6, 1, 25 *et seq.*) the topic of incompetency of *Súdras* to perform sacrifices or यागे शूद्रस्य अनधिकाराधिकरणम्। This view is entertained even now, with this difference only, that certain modern writers say that the *Homa* and the like ceremony may be performed by the *Súdras*, vicariously through the Bráhmana priests. But the Calcutta High Court and the Privy Council have held that this modern view, however beneficial and profitable it might be to the Bráhmanical class subsisting by priest-craft, is not binding on the *Súdras*, who may, therefore, validly adopt a son without performing the *Homa* ceremony: *Behari Lal* v. *Indromani*, 21 W.R., 285, affirmed by Privy Council, *Indromoni* v. *Behari Lal*, I.L.R., 5 C., 770.

(5) Nanda Pandita was neither a lawyer nor a judge, but merely a Sanskritist and teacher of the sacred literature, and the above prohibition may be fairly taken to be intended by him as directory only, and a rule of the Law of Honour. Nor does he say that an adoption made in contravention of that prohibition is invalid, as he has done in respect of another rule, see his Dattaka-Mímánsá v, 56.

Discussion academical.—This discussion is no longer of practical importance to lawyers; since the Judicial Committee have held that as Nanda Pandita's view has been adopted and acted upon by all the High Courts for 80 or 90 years, it is incompetent to a Court of Justice to treat the question now as an open one: *Bhagwan* v. *Bhagwan*, 26 I.A., 153, 166.

Case-law.—The prohibition is not followed in the Punjab; nor in Madras where the adoption of the daughter's and the sister's sons has been declared valid by custom amongst the

Bráhmanas, I.L.R., 9 M., 44; but notwithstanding, the adoption of the son of the daughter of an agnate relative has been held invalid, I.L.R., 11 M., 49. Nor did the prohibition obtain in Bombay before 1879 A. D. when, however, the adoption by a Bráhmana, of his daughter's son was declared invalid, I.L.R., 3 B., 273. The prohibition is not respected by persons adopting in the Kritrima form in Mithilá. In the North-West Provinces the adoption by a Bohra Bráhmana, of his sister's son has been held valid according to custom, I.L.R., 14 A., 53; and in the recent Full Bench case of *Bhagwan Sing*, I.L.R., 17 A., 294, it has been held by the Chief justice Sir John Edge and the majority of the Judges of the Allahabad High Court that Nanda Pandita's rule ought not to be enforced, and that the adoption of the daughter's son and the like is valid amongst the regenerate classes. But this decision of the majority has been overruled by the Judicial Committee, as has already been noticed, according to the maxim—*Communis error facit jus.* In Bengal there is no recent reported case on the point, but there were several early decisions in conflict with each other. Here a person's daughter's and sister's son being entitled to inherit his property even when he dies joint with his co-heirs, in preference to near agnates, the question would not arise in many cases, in which the daughter's and the sister's son as such would succeed, even if their adoption be invalid,—and this accounts for the paucity of cases. In a recent case which came up to the Calcutta High Court in second appeal, but ended in a compromise, a Bráhmana had adopted his sister's son and died leaving him and a widow and also a will, and then the adopted son died during the widow's lifetime leaving sons, and thence arose the litigation between the reversioner and the sister's son's sons.

The existence of usages to the contrary, proves that there was no restriction such as is propounded by Nanda Pandita. If the works of Nanda Pandita and his followers be thrown out of consideration, there is nothing else that may suggest to a student of Hindu Law, the existence of any such restriction.

Conclusion as to prohibited relations for adoption.—It should be observed that Nanda Pandita expressly prohibits a brother, an uncle, and a daughter's, a sister's, and a mother's sister's sons, of whom the last three only are to be excluded, according to the texts of Sákala and Saunaka; and Sutherland lays down the rule that a boy whose mother is prohibited for marriage to a man by reason of relationship, cannot be adopted

by him. It is very difficult to say what is the effect of the Judicial Committee's decision in *Bhagwan Sing's* case, on this rule, since the *ratio decidendi* of their Lordship's decision in that case may be contended to be applicable even to this wide rule enunciated by the learned translator, although it is not legitimately deducible from what Nanda Pandita says on the subject. Because, right or wrong, Sutherland's rule has been reiterated by most text-writers on Hindu Law as well as by the Judges of the highest tribunals in many cases, though it appears that there is only one single case in which an adoption has been pronounced invalid by the application of this rule propounded by the learned translator : I. L. R., 11 M., 49.

But in a recent case the Bombay High Court have, on a review of all the cases bearing on this subject, come to the conclusion that the rule that—"a man cannot adopt a boy whose mother he could not have legally married"— is confined to a *daughter's* son, a *sister's* son, and the *mother's sister's* son, who are specifically mentioned in the text of Sákala : *Ram* v. *Gopal*, I.L.R., 32 B., 619.

The learned Judges appear to have rejected Sutherland's rule by refusing to accept the glosses adding to the Smritis of Sákala and Saunaka—agreeably to the observations of the Judicial Committee in the case of *Sri Balusu* v. *Sri Balusu*, namely, that although—"Their Lordships cannot concur with Knox J., in saying that their (of Dattaka-Mímánsá and Dattaka-Chandriká) authority is open to examination, explanation, criticism, adoption, or rejection like any scientific treatises on European jurisprudence,"—yet,—"So far as saying that caution is required in accepting their glosses where they *deviate from or add to* the Smritis, their Lordships are prepared to concur with the learned Judge" : 26 I.A., 113, 132.

Caste.—The adoption of a boy belonging to a caste different from that of the adopter is not forbidden by the Smritis. There is, however, a passage in the alleged work of Saunaka, already referred to, recommending adoption within the caste; and providing that an adopted son belonging to a different caste is entitled to food and raiment only and not to a share of the property, as he cannot serve the spiritual purpose. The caste exclusiveness has become so rigid now, that an adoption of a son known to belong to a different caste, is impossible at the present day.

In an unreported case from Sylhet the High Court upheld

an adoption of a Káyastha boy by a man of the Shahoo caste, by reason of there being the usage of intermarriage between these castes.

Age and initiatory ceremonies.—Neither in the Smritis nor in the commentaries on general law is there any restriction either as to the age of, or as to the performance of any initiatory ceremony upon, a person, which limits his capacity for being adopted.

But Nanda Pandita cites a passage of the Káliká-Purána, a modern production called Upa-Purána, laying down that a boy who has completed the fifth year, or one upon whom the tonsure has been performed though he may be within the fifth year, cannot be adopted. Nanda Pandita, however, construes the passages to mean that a boy whose age exceeds five years cannot be adopted, and that one within that age may be adopted though the tonsure has been performed upon him, but in that case the additional sacrifice of Puttreshti must be performed.

In the Dattaka-Chandriká, the passage cited from the Káliká-Purána is declared spurious : but a new restriction is laid down to the effect that the age should not exceed the primary period for the ceremony of investiture with the sacred thread, which is the eighth year for Bráhmanas, the eleventh for Kshatriyas and the twelfth for Vaisyas; and that a Súdra may be adopted if unmarried.

Our courts, however, are disposed to reject these rules, but at the same time they appear to lay down the rule, namely, that a twice-born boy may be adopted if the ceremony of the investiture with the sacred thread has not actually been performed upon him ; and a Súdra, before his marriage : *Ganga* v. *Lekhraj*, I.L.R., 9 A., 253.

But there is no such restriction in the Punjab, or in Mithilá as regards Kritrima adoption, or amongst the Jainas ; or in Bombay where a married man with children may be adopted : *Dharma* v. *Ramkrishna*, I.L R., 10 B., 80. Amongst the Jainas also a married man may lawfully be adopted : *Asharfi* v. *Rup*, I.L.R., 30 A., 197. It is also held in Madras that according to custom amongst the Bráhmanas the adoption of a boy of a same *gotra*, after *upa-nayana* or investiture with the sacred cord, is valid, I.L.R., 9 M., 148.

This is another innovation introduced for the first time by Nanda Pandita, uselessly fettering the freedom of action of persons in a matter which is, as it ought to be, left by the Smritis to their discretion.

But it is worthy of remark, that for the purpose of affiliation an infant of tender age, whose mind and affections are yet unformed is preferable. There should also be such a difference in the age of the boy and the adoptive parents, that the former may look like the son of the latter. But all this should be left to the discretion of the persons concerned ; no rigid rule is desirable, and accordingly the Bombay High Court has expressed an opinion that the fact that an adopted son is older than the adopting mother does not invalidate the adoption : *Gopal* v. *Vishnu,* I.L.R., 23 B., 250.

Dattaka : what ceremonies are necessary.

The ceremonies of *giving* and *taking* are absolutely necessary in all cases. These ceremonies must be accompanied by the *actual delivery* of the child ; symbolical or constructive delivery by the mere parol expression of intention on the part of the giver and the taker, without the presence of the boy is not sufficient ; *Siddessory* v. *Doorga,* 2 Indian Jurist, N. S., 22. Nor are deeds of gift and acceptance executed and registered in anticipation of the intended adoption, sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery : *Nagendro* v. *S. Kishen,* 19 W.R., 133.

The formalities of giving and taking may be either what may be called ordinary and secular, or what may be designated religious and ceremonial, the latter are accompanied by the recital of Vedic texts, and therefore cannot be performed by Súdras and women ; and so in an adoption by them, the acceptance of the boy would be secular, like their acceptance of a chattel : D.M., i, 17.

In a Súdra adoption no other ceremony is necessary, giving and taking being sufficient. I have already told you that it has been held that *Homa* is not necessary for an adoption among Súdras : I.L.R., 5 C., 770 ; it used, however, to be, and still is, oftener than not, performed by them vicariously through their Bráhmana priests.

With respect to the three regenerate tribes the ceremony of *Homa* or burnt offering is said to be necessary in addition to giving and taking : see Mayne § 153, 7th edition.

The females of the regenerate classes are, like Súdras, incompetent to study the sacred literature ; so they cannot themselves recite the sacred texts and cannot consequently perform the sacrifices, although they may join their husbands

as indispensable associates in the performance of sacrifices. Hence widows like Súdras, can perform the *Homa* rite vicariously through the sacerdotal priests. The sacred texts are omitted if women or Súdras, perform any religious ceremony : स्त्रीशूद्राणाम् अमन्त्रकं । Váchaspati Misra, however, maintains in his Vivádachintámani that widows and Súdras cannot adopt at all, by reason of their incapacity to personally perform the *Homa* ceremony.

It should, however, be remarked that the performance of the *Homa* ceremony might be dispensed with in the case of an adoption by a widow of the twice-born classes, for the same reasons as in an adoption by a Súdra. Hence if *Homa* be not necessary in an adoption by a Bráhmaní widow, the result would be that it is not necessary in any case.

It is worthy of remark that according to Hindu law a boy could be given and taken as a slave and not as a son, such a slave was called *Dattrima* or *given* ; hence, so long as slavery was in force, the *Homa* ceremony was of very great importance, conclusively proving that the boy was adopted as the *Dattrima* or *given* son, and not given and taken as a *Dattrima* or *given* slave. But now that slavery has been abolished, it is not of much value in that way.

Dattaka : his status and rights.

In Natural Family.—Except for the purpose of prohibited degrees in marriage, the connection of the adopted son with his relations by birth becomes extinguished unless they be also his relations by adoption, as in the case of the adopter and the adoptee being related before adoption. In such cases, however, the original relationship ceases, and a new relationship based on adoption, arises as far as possible between the adoptee and the original relations, through the adoptive parents.

The consanguineal Sapinda relationship in the family of his birth continues even after adoption, and in consequence an adopted son cannot marry a damsel belonging to that family, who is within the degree of Sapinda relationship.

Dvyamushyayana.—So also a boy who is adopted in the *dvyámushyáyana* form retains his natural relationship to all the original relations, and acquires, in addition, a new relationship to his adoptive parents and their relations : 13 M.I.A., 85. He is called the son of two fathers, as he is not absolutely given away in adoption, but is made a son common to both his original as well as his adoptive parents, just as a property may be transferred so

as to become the joint property of the transferrer and the transferee. A son could be of this description either by operation of law, or by express agreement at the time of adoption, and not by reason of the performance by the natural parents of any initiatory ceremonies for the boy : such a son of two fathers is called *Nitya-Dvyámushyáyana* : *Behari* v. *Shib*, I.L.R., 26 A., 472. According to some, an only son can be adopted only in this form ; for, as a matter of law, he must continue his progenitor's son notwithstanding adoption in the ordinary mode. An express adoption in this form is now rare. If an only son of one brother be adopted by another brother or his widow, he becomes, by operation of law, the son of two fathers, an express stipulation being unnecessary : *Krishna* v. *Paramshri*, I.L.R., 25 B., 537.

The natural mother of a *nitya-dvyámushyáyana* son is entitled to inherit from him ; I.L.R., 26 A., 472.

Absolute adoption is civil death and new birth.—An absolute adoption appears to operate as birth of the boy in the family of adoption, and as civil death in the family of birth, having regard to the legal consequences that are incidents of such adoption. He is deemed to be begotten by the adoptive father on his own wife who is the adoptive mother. His status as son of his real parents ceases in the same way as if he were dead at the time of adoption. He cannot be born again without having been dead. Manu's text Nos. 11 and 12 (*Supra* pp. 121 & 122) as explained in the Dattaka-mímánsá and the Dattaka-chandriká, and by other Sanskrit commentators, are clear authority for the proposition that adoption is tantamount to civil death and fresh birth.

The boy cannot take away with him the natural father's *gotra* and *riktha*, when he is passing from the family of his birth to that of adoption, or more properly speaking, when he becomes divested by adoption, of the status of being the son of his progenitor, and is invested with the status of being the son of the adopter. His status of sonship to the real parents being extinguished, he ceases to be a member of the natural father's *gotra* or family, and his existing proprietary right in the progenitor's property also comes to an end, as well as his capacity to perform the exequial rites for the spiritual benefit of his natural father and other ancestors ceases ; both secular and spiritual connection with the natural parents and their relations, cease for ever. At the same time the very same connection, arises with the adoptive parents

and their relations ; he acquires the status of sonship to the adoptive parents, and as such becomes a member of the adopter's *gotra*, becomes a coparcener of his family estate, and is invested with the capacity for offering *pinda* to him and his ancestors.

According to ancient Hindu law the status of a person appears to have been determined by three things, namely, the *gotra*, the *riktha*, and the *pinda*. The Joint family system was and still is the distinctive feature of Hindu society, the family and not the individual was the unit of society, and each family was possessed of the *riktha* or property forming the hereditary source of maintenance of its members ; and it was an imperative duty of a person to provide with *pinda* or funeral oblations, the deceased ancestors of the family to which he belonged. The members of a family appear to have been divided into two classes, some were co-proprietors of the *riktha* or family estate, while the rest were not so, but entitled to maintenance only, out of the said estate.

The two passages of Manu, one (ix, 142) dealing with the extinction of the adopted son's status in the family of birth, and the other (ix, 158-160) with the accrual of the new status in the family of adoption, are illustrative, and are based on the principle and fiction of civil death and fresh birth. Accordingly the same legal consequences follow from adoption, as from retirement, or adoption of a religious order. The adopted son is to be deemed dead in the family of birth, and succession must therefore open to any property that may belong to him at the time of adoption, of which he becomes divested.

The law on the subject has been misunderstood, owing to the mis-translation of Manu's text, ch. ix, sloka 142 (text No. 11) which clearly implies that the adopted son's existing proprietary right in the natural father's property becomes extinguished ; otherwise, why should he not take away with him such property or his share in the same when he is leaving the progenitor's family for joining the adopter's family ? And the text has been so understood by all the Sanskrit commentators. The view expressed in the Tagore Law Lectures on adoption, that there is no authority for maintaining adoption to be tantamount to civil death,—is erroneous as being contrary to the said text of Manu, and to the commentaries on Hindu law, which do not appear to have been taken into consideration in the said Lectures ; although the same view has also been

taken in the case of *Behari* v. *Kailas*, 1 W. N., 121, in consequence of the proper materials for a correct decision not being placed before the learned judge.

Manu's text (No. 11 *Supra* p. 121) is cited and explained in both the Treatises on Adoption: (गोत्र-रिक्थे जनयितु र्न हरेत दत्रिमः सुतः। गोत्र-रिक्थानुगः पिण्डः, व्यपैति ददतः स्वधा॥) its correct translation is as follows, —"The *Gotra* (= sonship) and the *Riktha* (= wealth) of the progenitor, the Dattrima (= Dattaka) son is not to take away: the *Pinda* (= oblation offered to deceased ancestors) is follower of the *Gotra* and the *Riktha*; (therefore) the *Swadhá* (= *Pinda*) goes away absolutely from the *Giver* (of the son in adoption)."

The author of the Dattaka-Mímánsá (vi, 6-9) cites this text of Manu, and introduces it by saying,—"Manu declares also another rule," and explains the text thus,—

"The *given* son is not to partake of the progenitor's *gotra* and *riktha*; likewise of him who gives the son, the *swadhá*, *i. e.*, *sráddha* performed by the *given* son goes away absolutely (*i. e.*, ceases). The author of the (Smriti-) Chandriká (says)—'By this (text of Manu) is declared that by the very act creating filial relation (to the adopter), the given son's proprietary right in the adopter's property and the status of being of the same *gotra* with him, arise; and on the other hand, through the extinction of the filial relation (to the *giver*) from the very act of *giving* (in adoption), the extinction of the *given* son's proprietary right in the *giver's* property, and the extinction of the *giver's gotra*,—take place.'"

The author of the Dattaka-Chandriká also cites this text of Manu, (ii, 18-19) and offers the following comment on it,—"By this (text) it is declared that through the extinction of the filial relation (to the *giver*), from the very act of giving (in adoption), the extinction of the *given* son's proprietary right in the giver's property, and the extinction of the *giver's gotra*, —take place."

The commentators of Manu's Code and other commentators put the same meaning on this text of Manu, indicating that the *given* son's existing rights become extinguished by adoption. It should also be borne in mind that what is predicated with respect to the progenitor applies to all relations in the family of birth.

The principle which underlies what is understood to be the meaning of this text of Manu appears to be that adoption operates as civil death as if the adopted person as son of his natural parents, becomes dead, and at the same time operates

as new birth, as if he becomes again born as son of the adoptive parents. This principle is perfectly consistent with the principles of equity, justice and good conscience, and accordingly it has been adopted and acted upon by Justice Mukhopádhyáya an eminent judge distinguished for his scholarship and learning: *Birbhadra* v. *Kalpataru*, 1 L. J., 388.

Adopted son cannot renounce status by adoption.—The boy who is validly given away in adoption by his parents, has no choice in the matter : he cannot renounce the status as adopted son ; he cannot question the power of his parents to cause the severance of his connection with his natural relations; he may give up his right of inheritance from the adopter, but he cannot give up his status as adopted son, and return to his family of birth : *Mahadu* v. *Bayaji*, I.L.R., 19 B., 239.

Status and inheritance in the adoptive family.—The adopted son's status and rights in the family of adoption, are dealt with by the commentators, as being based upon express texts, and according to them the adopted son stands in many respects on a footing very different from that of the real legitimate son. As regards inheritance, there is a conflict between the Smritis, some of which are very favourable to the adopted son while others are not so, the latter admitting his right of inheriting from the adoptive father alone. The commentators endeavour to reconcile the conflicting texts by holding that possession of good qualities will entitle the adopted son to inherit from the adoptive father as well as from his relations ; otherwise, he will inherit from the adoptive father alone. There is, however, no express authority in Hindu law recognizing the adopted son's right of inheritance from the adoptive mother's relations.

Our Courts of Justice have avoided the difficulty by laying down a rule based upon the principle of equity and justice, and so cutting the Gordian knot of conflicting texts,—the principle being that the adopted son should have the same rights in the family of his adoption, as he loses in the family of his birth, unless there be express texts curtailing the same : they have thus adopted a principle which appears to be quite contrary to that followed by the commentators, namely, that the adopted son cannot claim any right unless there be an express text giving him that right,—and have disregarded the above distinction drawn by the commentators, by tacitly assuming the adopted son to be endowed with good qualities in every case.

Accordingly it is now settled by the decisions of the superior Courts that, as regards inheritance the adopted son holds in all respects the same position as an *aurasa* son of the adoptive father and the adoptive mother, and is entitled to all the rights of a real son of the adoptive parents with the exception of only such as has been *expressly* denied him.

The result is, that he will inherit from the adoptive father, the adoptive mother (*Teencowri* v. *Denonath*, 3 W. R., 49) and all their relations without any distinction or restriction, subject only to one exception mentioned below: the adopted son of a full brother will take in preference to the *aurasa* son of a half-brother; and one daughter's adopted son will inherit equally with another daughter's real son: *Padmakumari* v. *Court of Wards*, I.L.R., 8 C., 302; *Kalikomal* v. *Umasunker*, I.L.R., 10 C., 232; see also *Mokundo* v. *Bykunt*, I.L.R., 6 C., 289; *Sham* v. *Gaya* I.L.R., 1 A., 255; *Sumbhoo* v. *Naraini*, 3 Knapp, 55 = 5 W.R., P.C., 100.

Theory of adoption.—It has already been observed that the theory of adoption is complete affiliation, and consists one, then the question may arise as to which of them will be in the fiction of new birth, the adopted boy being deemed to be begotten by the adoptive father on his own wife. But it must not be supposed that the inequality of the *aurasa* and the *dattaka* sons as regards their rights, such as is found in the commentaries, is inconsistent with this theory. For even among *aurasa* sons unequal distribution of property at partition, is laid down in the Smritis, and used to be made in former times.

Adoptive mother.—When the adopter has more wives than one, then the question may arise as to which of them will be the mother of the adopted son. If the adopter allows any one of his wives to join him in the ceremony of taking the boy in adoption, in that case she will be his adoptive mother, and her co-wives his stepmothers, so that the adopting mother would succeed to him to the exclusion of the other wives of the adoptive father. See W. R., Gap. No., p. 71 and I.L.R., 18 M., 277. On appeal against this Madras case, the Judicial Committee held these two cases to be rightly decided. In this case a man selected one of his two wives to adopt a boy in conjunction with him, the boy inherited the adopter's estate and died an infant, leaving the two widows of the adopter; the adopting widow was held entitled to succeed to the estate in preference to the other: *Annapurni* v. *Forbes*, 26 I.A., 246.

But a difficulty arises if the adopter alone takes the boy, or when all his wives join with him, if the latter course be possible. In either case all the wives might be taken to be his adoptive mothers. But fiction would then surpass nature: joint production of a single son by several females is a phenomenon unheard of, except in the story of Jarásandha in our Mahábhárata. The Itihásas and the Puránas, however, are our books of precedents, and you may rely upon them for drawing an argument by analogy in favour of the adopted son's rights. So the adopted son who is a favourite of law would have different sets of maternal relations to inherit from, if such an anomaly be permissible.

A greater difficulty presents itself when a widower or a bachelor adopts. In the first case it might be said that the deceased wife of the adopter will be the adoptive mother, and her relations the maternal relations of the adopted son. The difficulty in the latter case, however, must remain unsolved.

But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee, her legal son. Even when a man has only one wife, and the man alone adopts, and the wife does not join in the act of adoption or concur in it, the legal relation of mother and son cannot arise between them. Nanda Pandita, no doubt, maintains that although the husband's assent is necessary for an adoption by the wife, yet the husband may adopt without the assent of the wife, and the son so adopted would belong to the wife, in the same manner as any property given to, and accepted by him. But as the wife's co-ownership in the husband's property, although it amounts to a legal interest therein, is neither co-equal nor similar to that of the husband, but is subordinate in quality and character, and is acknowledged to entitle her to use and enjoy the same, as wives usually do; similarly, there can be no actual and legal relation of mother and son between the wife taking no part in the adoption, and the husband's adopted son, any more than between a wife and the husband's begotten son by her co-wife. That a stranger adopted by a man without the concurrence, or even against the will, of his wife, would become legally her son, is a proposition which must be established by authority; should there be none, the above *ipse dixit* of Nanda Pandita declaring the husband's independence of the wife as regards adoption, would not be sufficient for that purpose. It would

be begging the question to say that the husband's adopted son becomes the son of his wife, when he has only one wife, even without her consent, Nanda Pandita also, appears to indicate that acceptance by the wife is necessary to constitute her the legal mother of her husband's adopted son, by saying that the ancestors of the *mother that accepts* in adoption —प्रतिग्रहित्री या माता—are the adoptee's maternal grandsires in the ceremony of Párvana Sráddha performed by him: Dattaka-mímánsá, vi, 50. Hence the term, 'adoptive mother' must be taken in its primary meaning of *adopting* mother, and not in the figurative sense of the adopter's wife. The Sanskrit rule of legal construction is that every word should be taken in its ordinary primary meaning न विधौ परः शब्दः। The incidents of Kritrima adoption in *Mithilá*, throw considerable light on the point.

Ante-adoption agreement curtailing adopted son's rights.—It has already been noticed that a widow is not legally bound to execute the power of adoption, however solemnly she might be enjoined by the husband. Her interest in the husband's estate is not affected by her omission to adopt. Her interest is opposed to her duty to carry out the husband's wishes; these are sought to be reconciled by an agreement before adoption, between the widow and the natural father of the boy, whereby the widow retains some interest in the husband's estate for her life. Such arrangement does not appear to be open to any valid objection, if the right retained does not exceed the widow's estate which she is entitled to enjoy notwithstanding an authority to adopt, which she may ignore. It cannot be deemed to be a fraudulent execution of the power. When the donee of the power derives a benefit from the execution of the power in a particular manner, but for which he could not have got the benefit, then and then only the execution may be regarded a fraud upon the power. But the power of adoption is a peculiar one, the like of which is not found in the English law. The Bombay High Court has held that an agreement by the natural father consenting to the retention by the adopting widow, of certain interest in the husband's estate is binding on the adopted son: *Ravji* v. *Lakshmi*, I.L.R., 11 B., 381, 398. The Judicial Committee have expressed an opinion against such agreement, in a case in which it was made *after* adoption. Their Lordships observed,—"No conditions were attached to the adoption. Had it been otherwise, the analogy, such as it is, presented by the doctrine of Courts of Equity in this country relating to the execution of powers

of appointment would rather suggest that, even in that case, the adoption would have been valid and the conditions void."—16 I.A., 59=I.L.R., 16 C., 556.

Relying on this *obiter dictum* of the Privy Council the Madras High Court held that the adopted son's rights cannot be curtailed by any ante-adoption agreement of the natural father: *Jagannadha* v. *Papamma*, I.L.R., 16 M., 400. But the attention of the court appears to have not been drawn to the decision of the Privy Council in the case of *Ramasami* v. *Venkatarama*, (6 I. A., 197, 208 = I.L.R.. 2 M., 91, 101), in which their Lordships observed that the question how far the natural father can by agreement before adoption renounce his son's rights is not unattended with difficulty; and then after referring to the Bombay case of *Chitko* v. *Janaki*, (11 B. H. C., 199) in which such agreement was declared valid and binding,—went on to say,—"In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was *not void*, but was, at the least, capable of ratification when his son became of age."

The effect of such a view as the one taken in the above Madras case would be, that adoption will not take place at all in most cases, that is to say, a greater fraud will be perpetrated on the power, which the courts are powerless to prevent. It is doubtful whether this result is desirable, and our courts should consider whether it is not preferable that the lesser fraud, if fraud it be, should be permitted. Besides it would be no less a fraud on the Purdanashin widow who is induced to adopt upon the understanding, that the conditions subject to which she adopts are valid and binding on the adopted son, if the conditions be declared void and the adoption good.

In the recent case of *Visalakshi* v. *Sivaramien*, I.L.R., 27 M., 577,—in which an adoption was made by a widow in consequence of the consent of the natural father to the terms of a registered deed executed by her in favour of the adopted son before adoption, whereby it was provided that in case of disagreement between the adopted son and the widow, she should enjoy for her life about a moiety of the husband's estate, which would devolve after her death on the adopted son,—a Full Bench of the Madras High Court have held that the provision in favour of the widow is binding on the adopted son. The previous ruling in the above Madras case is over-ruled by the Full Bench, the view taken therein being such that cannot be maintained as just and equitable. The real test in

such cases is, whether the arrangement is fair and reasonable, and is such as is necessary for safe-guarding the interest of the Purdanashin ladies who are entitled to the protection of the Courts in the same manner as the infants that are adopted.

Adopted son's share.—The only exception, agreeably to the principle (p. 166) mentioned above, is, as to the amount of share to be obtained by the adopted son when a real son becomes subsequently born to the adoptive father, there being express texts giving to the adopted son, a lesser share in that event. In this respect too, there are conflicting texts, some giving him a third share, some a fourth share, while there is a text of Vriddha-Gautama, cited in the Dattaka-mímánsá, v, 43, which says that an adopted son endowed with excellent qualities and an after-born son are equal sharers.

In dealing with the adopted son's heritable right, our Courts have assumed him to be endowed with excellent qualities in all cases; if the same assumption be made with respect to the question as to the amount of his share, when an *aurasa* son is subsequently born, then he should get an equal share in all cases, according to the above text of Vriddha-Gautama. But the question has not been considered from this point of view, in the cases on the subject.

Vasishtha (Text No. 2, p. 118 *ante*) lays down that if an *aurasa* son be born after adoption, then the Dattaka son gets a fourth share. But Devala (cited in the Dáyabhága, Ch. x, para 7) says that he partakes of a third share.

The expressions one-third share and one-fourth share appear to be used in the texts, as having reference to the share of the *aurasa* son; and not as being so much part of the estate, for if that had been the case, then if many real sons be born, the adopted son would have got a larger share than each of them. The conflict has not been reconciled, nor are the terms satisfactorily explained. But the rule adopted is, that in Bengal the adopted son would get half of what a begotten son gets (I.L.R., 4 C., 425); and in other places, one-third of the same (1 Mad. H.C.R., 45; I.L.R., 16 B., 347). But it has recently been held by the Bombay High Court that he is entitled to a fifth share instead of a fourth share, (*Giriapa* v. *Ningapa*, I.L.R., 17 B., 100), in other words, to one-fourth of what a legitimate son gets. And in a still more recent case the Calcutta High Court also have taken the same view: *Bir* v. *Kalpa*, 1 L.J., 388.

But the quarter share to which a maiden sister is entitled on partition made by her brothers of the joint family property

is thus explained in the Mitáksharâ, (Ch. 1, sect. vii, paras. 5-7,)—at first allot to each of the maiden sisters a share equal to that of a brother and a wife of the father, if any, and then assign one-fourth of such a share to each of the maiden sisters, and then distribute the residue equally among the brothers and the mother and step-mother if any.

If the Dattaka son's one-third or one-fourth share be explained in this way, then he is to get $\frac{1}{6}$ or $\frac{1}{8}$, if only one son be born after adoption,—and $\frac{1}{9}$ or $\frac{1}{12}$ if two sons be born.

There is no other express authority in the Smritis for curtailing the rights of the adopted son. But the author of the Dattaka-chandriká extends this rule of difference in shares, to cases of partition between male descendants in the male line down to the great-grandson, where there is competition between an adopted and a real descendant. He does so by analogy which would make the rule applicable to all cases in which there is competition between a real and an adopted relation.

The extended rule has been followed by the Calcutta High Court in a case in which the adopted son of one brother brought a suit for partition against the sons of two other brothers (*Raghub* v. *Sadhu*, I.L.R., 4 C., 425); they formed members of a joint family governed by the Mitáksharâ. The Madras High Court doubts the correctness of this decision: (*Raja* v. *Subbaraya*, I.L.R., 7 M., 253).

The rule was not applied to a case in which the adopted son of one daughter was a claimant together with the real legitimate son of another daughter, both of whom were held to be equal sharers (*Surjo* v. *Mohes*, I.L.R., 9 C., 70).

Another novel rule enunciated for the first time by the Dattaka-chandriká, is, that a Súdra's adopted son should share *equally* with his begotten son, on the ground that a Súdra's illegitimate son may by the father's choice get an equal share with his legitimate sons. It is difficult to understand the cogency of this argument. This rule, however, has been followed by the Madras High Court (I.L.R., 7 M., 253), for this book is said to be of special authority in Bengal and Madras.

Adopted son's right as against adopter.—The position of an adopted son is secure under the Mitáksharâ : for as he is entitled to all the rights of a real legitimate son, he acquires from the moment of adoption, a right to the ancestral property, so as to become the co-owner of the adoptive father with co-equal rights. But if his position be not better than that

of a real legitimate son, then under the Dáyabhága, and also under the Mitákshará so far as regards the self-acquired property, the adopted son would be left completely at the mercy of the adoptive father. The proposition that an adopted son is entitled to the same rights as a real legitimate son of the adoptive parents, confers on him in Bengal the contingent and uncertain right of inheriting from them and all their relations. But the certain right of inheriting the adopter's property ought to be secured to him by curtailing the adopter's power of giving away his property to the detriment of the adopted son, seeing that the moving consideration inducing the parents to give their son in adoption is, his advancement by his appointment as heir to the adopter's property. According to the principle of equity and justice, therefore, our Courts are competent to protect an adopted son against the capricious and whimsical disposition of his property by the adoptive father, made with a view to deprive the son, of the right of inheriting the same, when the protection afforded by natural love and affection to real legitimate sons is wanting in his case. There are, however, some cases governed by the Mitákshará, in which it has been held that an adoptive father is competent to make a gift of his self-acquired immoveable property either by an act *inter vivos* (*Rungama* v. *Atchama*, 4 M.I.A., 1 = 7 W.R., P.C., 57) or by a will (*Purushotam* v. *Vásudev*, 8 Bom., H.C.R., O.C., 196 ; *Sudanund* v. *Bonamalee*, Marshall, 137 = 2 Hay, 205), so as to deprive the adopted son. But in these cases, the principle of equity could not be invoked, inasmuch as the adopted sons became entitled to large ancestral estates.

In Hindu law adoptions took the place of Wills which were unknown and unrecognized. Adoption is regarded by the Hindus as an appointment of the heir and successor to the adopter. The moving consideration influencing the natural parents to give away their son in adoption is the belief that it is an advancement of the child who is sure to get the rich inheritance of the adoptive father. They would not have parted with their son, if they had believed that the adopter could disinherit him, according to his pleasure: had they thought such disinherison possible they would have required the adopter to settle his property on the boy before making the gift. But this course has now become absolutely necessary, inasmuch as the Privy Council have held that in adoption there is no implied contract with the natural father

that in consideration of the gift of his son, the adopter will not make a will, depriving the adopted son of his estate: (*Sri Raja* v. *Court*, 26 I.A., 83=3 W.N., 415). It is so held even in a case where there was an express agreement in which it was said that the adopter constituted the boy his heir to his estate; their Lordships remarked that by saying that the adopter meant only that he had given him the same right of inheritance as a natural son would have. But it should be observed that that is a right which the law gives to an adopted son, no contract was necessary for securing it to him in that case.

Adoption by widow and divesting.—When a person dies giving an authority to his widow to adopt a son unto him, then his estate must vest in the nearest heir living at the time of his death; for a Hindu's estate cannot remain in abeyance for a nearer heir who may come into existence in future. Hence if he dies without leaving male issue, his estate must vest either in his widow or widows, or in the surviving collateral male members of the joint family if governed by the Mitákshará. If again the person leaves behind him a son and authorizes his widow to adopt in the event of that son's death without male issue, his estate vests in that son, and on the latter's death may vest in a person other than the widow authorized to adopt. Between the death of the adoptive father and the adoption, succession, might open to the estate of deceased relations of the adoptive parents, which would have devolved on the adopted son, had his adoption taken place before the falling in of the inheritance. Hence arises the vexed question as to what estates, already vested in other persons, may a subsequently adopted son take by divesting them, the ordinary rule of Hindu law being that an estate once vested by inheritance cannot be divested by reason of any subsequent disqualification of the heir: (*Moniram* v. *Keri*, I.L.R., 5 C., 776), or by reason of a nearer heir coming into existence afterwards: (*Kalidas* v. *Krishna*, 11 W.R., O.C., 11=2 B.L.R., F.B., 103). Hence divesting by adoption is an exceptional rule founded on the peculiar character of the institution, and entirely based upon judicial decisions which do not seem to be quite consistent.

When the estate is vested in the adopting widow as heiress of her deceased husband, she becomes divested by the adoption which is an act of her own choice. If the husband's estate is vested in two co-widows, and one of them

adopts a son in the exercise of the power granted by the husband, it has been held that both the widows become divested: *Mondakini* v. *Adinath*, I.L.R., 18 C., 69. So in Bombay it has been held that when the senior widow without authority from the husband adopts a son of her own accord, the junior widow is also divested of her interest in the husband's estate (5 Bom., H.C.R., A.C.J., 181; 8 *idem*, 114). But in a case where a person died leaving two widows and a son by the senior widow, and giving authority to the junior widow to adopt in the event of that son's death, and on the happening of that event the junior widow adopted a son, it has been held that the senior widow cannot be divested of the estate which became vested in her as the mother and heiress of the son: *Faiz-uddin* v. *Tincowri*, I.L.R., 22 C., 565. So also when on the existing son's death the estate vested in his widow or in his paternal grandmother or other heir, it has been held that his mother in the former case, and his stepmother in the latter, could not adopt, and cause the estate to be divested: *Bhoobunmoyee* v. *Ramkisore*, 10 M.I.A., 279 = 3 W.R., P.C., 15; *Dromomoyee* v. *Shama*, I.L.R., 12 C., 246; *Annammah* v. *Mabbu*, 8 Mad., H.C.R., 108; *Anandi* v. *Kashi*, I.L.R., 28 B., 461.

But if the estate vests in the adopting widow by inheritance from her son or son's son, and she then adopts, the adoption will be valid, and the widow will be divested of the estate, according to the Mitákshará school: *Jamnabai* v. *Raychand*, I.L.R., 7 B., 225; *Ravji* v. *Lakshmibai*, I.L.R., 11 B., 381; *Lakshmi* v. *Gatto*, I.L.R., 8 A., 319; *Manikchand* v. *Jugutsettani*, I.L.R., 17 C., 518. The law may be contended to be different in the Bengal school, as regards divesting in such cases, because here under no circumstances can a brother take in preference to the mother, or a paternal uncle in preference to the paternal grandmother; whereas according to the Mitákshará the male members of a joint family take, to the exclusion of the females, the undivided coparcenary interest of a deceased member; and the adoption may be assumed to relate back to the time when the estate vested in the adopting widow. Opposite opinions have been expressed by the learned Judges of the Calcutta High Court, the preponderance is in favour of the view that the mother becomes divested: see *Padma* v. *The Court*, I.L.R., 5 C., 615; 2 W. N., 389 = I.L.R., 25 C., 662 and *Rai Jatindra* v. *Amrita* 5 W. N., 20. The principle upon which is based, the opinion expressed by the Judicial Committee in the cases of *Bhoobunmoyee*

(10 M.I.A., 279) and *Vellanki* (I.L.R., 1 M., 174), namely, that the widow becomes divested of the estate even when inherited by her from a deceased son,—appears to be, that the power of adoption is a kind of power of appointment, (*Bai Moti* v. *Bai Mamu*, I.L.R., 21 B., 709), and accordingly the adoption of a son by the widow operates as the execution of the power and the appointment of the property to the adopted son, and so the widow becomes divested by the operation of law, of the property, from whomsoever inherited.

An adoption by the widow of a predeceased son without the assent of her mother-in-law cannot divest the latter of the father-in-law's estate vested in her : *Gopal* v. *Vishnu*, I.L.R., 23 B., 250.

When a member of a joint family governed by the Mitákshará dies giving permission to his widow to adopt a son, then his undivided co-parcenary interest vests, on his death, in the surviving male members, who however, will be divested by the subsequent adoption made by the widow : *Bachoo* v. *Mankonebai*, 34 I.A., 107 ; *Sri Virada* v. *Sri Brozo*, I.L.R., 1 M., 69=3 I.A , 154 ; *Surendra* v. *Sailaja*, I.L.R., 18 C., 385. It should be observed, however, that vesting and divesting go on continually by births and deaths in a Mitákshará joint family, and the law in this respect, is somewhat different in the two schools. But it appears that if the male member in whom the undivided interest of another member authorizing his widow to adopt, vests by survivorship, dies and the whole family property vests in his widow, and then the other widow adopts, such adoption would be invalid by reason of the second widow being not divested : *Rupchund* v. *Rukhmabai* 8 Bom., H.C.R., A.C.J., 114. The distinction is that if the adoption is made when the undivided co-parcenary interest of the adoptive father remains vested in his co-parcener taking by survivorship the interest is divested and the adoption is valid ; but if the adoption is made after the estate has passed from the co-parcener taking by survivorship to his heir then the estate cannot be divested and the adoption is invalid : *Chandra* v. *Gojarabai*, I.L.R., 14 B., 463.

An adoption made with the assent of the person in whom the estate is vested will divest him of that estate : *Payapa* v. *Appanna*, I.L.R., 23 B., 327.

As regards the estate of any other than the adoptive father, succession to which had opened before adoption, the adopted son cannot lay any claim to the same (*Kally* v *Gocool*,

I.L.R., 2 C., 295), even when the adoption was delayed by the fraud of the person in whom the succession vested : *Bhubaneswari* v. *Nilkamal*, I.L.R., 12 C., 18 affirming I.L.R., 7 C., 178.

Unauthorized alienation by widow.—As an adopted son becomes entitled to the adoptive father's estate by divesting the widow, he acquires from the time of adoption the right to recover any property that has been alienated by the widow without legal necessity. He is not to wait until the widow's death, like the reversioner ; for, the widow's estate comes to an end immediately on adoption, consequently no unauthorised alienation by her, can subsist beyond the extinction of her own title which alone could pass to her transferee : *Bonomali* v. *Jagat*, 1 L. J., 319 ; *Moro* v. *Balaji*, I.L.R., 19 B., 809.

A contrary view, however, has been taken in some cases in which the unauthorized alienation by the widow before adoption is held valid for her life, upon the hypothesis that she had power to transfer her life-interest : *Sreeramulu* v. *Kristama*, I.L.R., 26 M., 143. Some learned Judges of the Calcutta High Court thought that in *Bhoobunmoyee's* case (10 M. I. A., 279) the adoption was not intended to be declared invalid, but all that the Privy Council intended to lay down, was, that the adopted son, as brother to the last full owner of the estate, could not succeed during the life-time of his widow and mother, (I.L.R., 5 C., 615, 644), and accordingly their Lordships held *that the adopted son could not get possession of any property* alienated by the widow, during her life : 24 W. R., 183 ; I.L.R., 2 C., 295, 307 ; I.L.R., 4 C., 523.

It is difficult to understand how the widow could be held to have a life-interest in the estate inherited by her. If that were so, how is she divested by adoption. If the exercise of the power of adoption operates as the appointment of the estate to the adopted son, the legal effect of which is to cause the estate to vest in the son by divesting the widow, then the widow's transferee also must necessarily be divested ; he cannot be in a higher position than the widow herself. It is impossible to find out any principle for drawing a distinction between the widow and the transferee from her, with respect to divestment. There is no reason why the widow's estate should be deemed liable to determination by her death or remarriage only, and not also by adoption under the husband's power. The adopted son's rights should be the same as those of a posthumous son. A purchaser from a widow who is authorized to adopt, cannot invoke any principle of equity for preventing

the immediate resumption by the adopted son, of what has been alienated without legal necessity. The adopted son's cause of action is held by the Privy Council to arise from the date of adoption, to recover possession from the widow's transferee : *Rai* v. *Jagat*, 32 I.A., 80 = 1 L.J., 319.

Effect of invalid adoption.—There are two elements in an adoption, *first*, the transfer of the *patria potestas* or paternal dominion over the boy from the natural father to the adopter, causing the extinction of his status in the family of birth, *second*, the investment of the boy with the status of son unto the adopter. When slavery was recognised, if the adoption was invalid, the boy would not acquire the status of sonship to the adopter, but the effect of *gift* by the father or the mother and *acceptance* of the boy, would be the loss of his status in the family of birth, and the acquisition of the condition of a slave of the adopter, and as such he was entitled to maintenance only in the family of adoption. But such an effect as this cannot arise now that slavery has been abolished : if the adoption fails, the boy's status in the family of his birth will remain unaffected by the invalid adoption. This distinction is not borne in mind. There are some decisions in which the former view was taken, which was correct before the abolition of slavery ; while there are others in which the latter view has been expressed.

Suit to set aside an invalid adoption.—The presumptive reversioner or more properly the next heir and when he refuses or is in collusion or is a female the remoter reversioner is permitted to bring a suit for a decree declaring the invalidity of an adoption during the life of the adopting widow. Considering the grave and important nature of disputes relating to the truth or validity of an adoption involving questions of family status and the serious consequences of a decree declaring the invalidity of an adoption on the rights of the boy adopted, it appears to be desirable that such suits should be permitted to be brought within a short time from the time of adoption, and that the adjudication made in them should be made final as far as possible. But with respect to suits relating to alienations made by a female heir it has been held in a series of cases that the presumptive reversioner cannot represent the remote reversioners. And although suits to set aside adoptions are analogous to suits relating to alienations, still they stand on a different footing. Accordingly a Full Bench of the Madras High Court have in an elaborate judgment held that on

principle the presumptive reversioner or a more remote reversioner when permitted to bring such suit, ought to be held to represent all reversioners provided the plaintiff disclose the names of all persons interested in the reversion and serve notices on them to enable them to be made parties should they so desire, and provided the matter is decided after a fair trial : the true object of the concession of this right of suit, is, the protection of the interest of the actual reversioner, and the perpetuation of testimony which might be lost by the time the succession actually opens: *Chiruvolu* v. *Chiruvolu*, I.L.R., 29 M., 390.

The grounds on which such suits are brought are the absence or illegality of the power of adoption given to the widow, the ineligibility of the boy by reason of his being within prohibited degrees for adoption, or other defects, and the non-performance of the necessary ceremonies. The payment by the adopter of any consideration to the boy's natural father for inducing him to make the gift in adoption, has in some cases been contended to constitute the boy as *krita* or *purchased* son, and not Dattaka son, and so to render the adoption invalid. But the Madras High Court have held that the receipt of money by the natural father in consideration of giving his son, though unlawful, does not vitiate the adoption consisting of the gift and acceptance of the boy—which is a distinct and separate transaction : *Murugappa* v. *Nagappa*, I.L.R., 29 M., 161. But see 21 W. R., 381, *contra*.

Limitation for declaring invalidity of adoption.—The view that if an adoption is invalid, the adopted son's natural rights remain quite unaffected, is just and equitable. There is, however, great practical difficulty in giving effect to it, when the adoption is set aside after a considerable time has elapsed from adoption, and most of his natural rights have become barred by limitation.

While construing the provisions of the Limitation Act of 1871, on this point, the Judicial Committee observed,—"It seems to their Lordships that the more rational and probable principle to ascribe to an act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoption shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession" : *Jagadamba* v. *Dakhina*, 13 I.A., 84 = I.L.R., 13 C., 308.

But nevertheless, all the High Courts did at one time hold that under the present Limitation Act the reversionary heir is entitled to twelve years after the death of the widow who inherited her husband's estate and adopted a son unto him, for instituting a suit to obtain possession of the estate on declaration of the invalidity of the adoption, and that the Article 118 applies to suits for declaratory decrees only: see I.L.R., 25 C, 354; I.L.R, 27 C, 242 and the cases cited therein. But recently, having regard to the principle enunciated by the Judicial Committee in *Jagadamba's* case, and to an observation made by their Lordships in *Mohesnarain's* case (20 I.A., 30 = I.L.R, 20 C., 487), and also to the decision in *Luchman Lal's* case (22 I.A, 51 = I.L.R., 22 C, 609) the Madras High Court, and a Full Bench of the Bombay High Court presided by Sir Lawrence Jenkins, have held that the Article 118 of the present Limitation Act governs a suit for a declaration that an adoption was invalid, whether the question as to its validity is raised by the plaintiff in the first instance, or arises in consequence of the defence setting up the adoption as a bar to the plaintiff's claim to the adoptive father's estate: *Parvathi* v. *Saminatha*, I.L.R, 20 M, 40, and *Shrinivasa* v. *Hanmant*, I.L R., 24 B, 260; *Lakmana* v. *Ramappa*, 32 B., 7.

This view is supported by the opinion expressed by the Privy Council in the subsequent case of *Malkarjun* v. *Narhari* (27 I.A., 216 = I.L.R, 25 B., 337), in which their Lordships held by applying the principle set forth in *Jagadamba's* case that one year's limitation prescribed by Article 12 (*a*) of the Act of 1877, is not confined to only suits in which no other relief than a declaration setting aside a sale, is sought, but applies also to suits where other relief is sought which can only be granted by setting aside the sale. This principle is applicable *mutatis mutandis* to Articles 118 and 119 of the present Limitation Act XV of 1877.

But in the recent case of *Thakur Tirbhuwan* (33 I.A., 156) the Judicial Committee appear to have expressed a contrary opinion which is no doubt an *obiter dictum*.

The Allahabad High Court, however, adheres to the old view: I L.R., 24 A., 195; 26 A., 40. The Calcutta High Court appear to be divided in opinion; see I.L.R, 30 C., 990, 996; 9 W.N., 222; see also I.L.R., 26 M., 291.

Invalid adoption and *Persona designata.*—When a gift is made by a Deed or a Will to a boy who has been adopted, or whose adoption is directed, by the donor, but who is not adopted or whose adoption is held invalid, then a question

arises with respect to the validity of the gift. If the intention is clear to benefit the boy who is identified irrespective of adoption, the reference to which is intended as mere description, then the gift must be held good according to the same principle as is laid down in Section 63 of the Succession Act: *Nidhoo* v. *Sarada*, 3 I.A., 253=26 W.R., 91; *Bir* v. *Ardha*, 19 I.A., 101=I.L.R., 19 C., 452. But, if on the other hand, the adoption of the boy appears to be the condition of, or the moving consideration for, the gift, then the gift cannot take effect, if the adoption fails or is pronounced invalid: *Fanindra* v. *Rajeswar*, 12 I.A., 72=I.L.R., 11 C., 463; *Karamsi* v. *Karsan*, I.L.R., 23 B., 271.

KRITRIMA ADOPTION.

According to the Smritis and the commentaries, the Kritrima form differs from the Dattaka only in this, that in the latter the boy is given in adoption by his natural parents or either of them, whereas in the former, the consent of the boy only is necessary who should therefore be destitute of his parents, and thus *sui juris*, so as to be competent to give his assent to his adoption: in all other resdects there is no difference between the two forms.

But the so-called Kritrima adoption that is now prevalent in Mithilá appears to be a modern innovation and altogether a different institution from that dealt with in Hindu law.

The Kritrima form of adoption such as is now made in Mithilá, does not appear to be *affiliation* but is something like a contractual relationship between only the adopter and the adoptee.

In this modern form a man and his wife may either jointly adopt one son; or may each of them separately adopt a son, so that the son adopted by the husband does not become the wife's son, and *vice versa*; and in such a case the son of the one does not perform the exequial ceremony, nor succeed to the estate, of the other: *Sreenarain* v. *Bhya*, 2 Sel. Rep., 29 (23); see also 7 W.R., 500 and 8 W.R., 155.

The offer by the adoptive parent expressing his desire to adopt, and the consent to it by the boy, expressed in the lifetime of the former are sufficient to constitute adoption. No religious ceremonies or burnt sacrifices are necessary in this form: *Kullean* v. *Kripa*, 1 Sel. Rep., 11. There is no restric-

tion in this form as to the capacity of being adopted, such as being an only son, particular age, or performance of the Upanayana ceremony or marriage, and particular relationship: 3 Sel. Rep., 192 = 145 Old Edition.

The adoptee in this Kritrima form does not lose his *status* in his family of birth, and by the adoption he acquires the right of inheriting from the adoptive parents or parent alone. He cannot take the inheritance of his adopter's father or even of the adopter's wife or husband, the relationship being limited to the contracting parties only: 7 W.R., 500; 8 W.R., 155; 25 W.R., 255.

According to the authoritative commentaries of the Benares school the Kritrima form of adoption may be made in the Kali age, in addition to the Dattaka form, and it appears to prevail in many places in Northern India, if not also in the Deccan. But this form whenever met with at a place other than Mithilá, must not be confounded with the modern innovation of the latter district, which though called *Kritrima* is altogether different from it. The real Kritrima form is exactly similar to the Dattaka one as regards their incidents.

Properly speaking the name *Kritrima* should not be applied to the adopted sons that are popularly called by a different name in Mithilá, namely, *Kurta-putra* which does not appear to be a corruption of *Kritrima-puttra* but of *Krita-puttra.*

Mithilá is the modern district of Tirhoot which is a corruption of the word *Tíra-bhukti* meaning the country "bounded by the banks" of three rivers, namely, the Gandak in the west, the Kosi in the East, and the Ganges in the South.

CHAPTER V.

MITÁKSHARÁ JOINT FAMILY.

ORIGINAL TEXTS.

१। भू-र्या पितामहोपात्ता निबन्धो द्रव्यम् एव वा।
तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः॥

1. In land which was acquired by the grandfather also in a corrody or in chattels (acquired by him), the ownership of both father and son is similar.

२। मणिमुक्ताप्रवालानां सर्व्वस्यैव पिता प्रभुः।
स्थावरस्य समस्तस्य न पिता न पितामहः॥

2. The father is master even of all of gems, pearls and corals : but neither the father nor the grandfather is so, of the whole immoveable property.

३। स्थावरं द्विपदञ्चैव यद्यपि स्वयम् अर्ज्जितं।
असम्भूय सुतान् सर्व्वान् न दानं न च विक्रयः॥
ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः।
वृत्तिं तेऽप्यभिकाङ्क्षन्ति वृत्तिलोपो विगर्हितः॥

3. Though immoveables and bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. Those that are born and those that are yet unbegotten, and those that are still in the womb, all require the means of support: the dissipation of the hereditary source of maintenance is censured.

४। अविभक्ता विभक्ता वा सपिण्डाः स्थावरे समाः।
एको ह्यनीशः सर्व्वत्र दानाधमन-विक्रये॥

4. Kinsmen joint or divided are equal in respect of immoveables; for, one is not competent to make a gift, mortgage or sale of the whole.

५। एकोऽपि स्थावरे कुर्य्याद्-दानाधमन-विक्रयम्।
आपत्काले कुटुम्बार्थे धर्म्मार्थे च विशेषतः॥

5. Even a single member may make a gift, mortgage or sale of immoveable property, at a time of distress, for the sake of the family, and specially for (necessary) religious purposes.

६। अनेकपितृकाणान्तु पितृतो भागकल्पना।

6. Among grandsons by different fathers, the allotment of shares is according to the fathers (i.e., *per stirpes*).

७। शक्तस्यानीहमानस्य किञ्चिद्-दत्वा पृथक्-क्रिया।

7. The separation of one who is able (to support himself), and is not desirous (of participation in the patrimony) may be completed by giving him a trifle.

८ विभक्तेषु सुतो जातः सवर्णायां विभागभाक्।

8. A son born of a wife of equal class, after the (other) sons have been separated is entitled to the (parental) share.

९। अनीशः पूर्व्वजः पित्रो-र्भ्रातु-र्भागे विभक्तजः।

9. A son begotten before partition has no claim on the share of the parents; nor one, begotten after it, on that of a brother.

१० यदि कुर्य्यात् समानंशान् पत्न्यः कार्य्याः समांशिकाः।
न दत्तं स्त्रीधनं यासां भर्त्रा वा श्वशुरेण वा॥

10. If he make the (sons') allotments equal, his wives to whom *Strídhanam* has not been given by the husband or the father-in-law, shall be made partakers of equal allotments.

११। विभजेरन् सुताः पित्रो रूर्द्ध्वम् रिक्थम् ऋणं समं।

11. Let the sons divide equally the property and the debts after the demise of the parents.

१२। पितुरूर्द्ध्वं विभजतां माताप्यंशं समं हरेत्।

12. The mother also, of those dividing after the death of the father, shall take an equal share.

१३। असंस्कृतास्तु संस्कार्य्या भ्रातरः पूर्व्वसंस्कृतैः।
भगिन्यश्च निजाद्-अंशाद्-दत्वांशन्तु तुरीयकं॥

13. Uninitiated brothers should be initiated by those, for whom the ceremonies have been already completed; and sisters should be disposed of in marriage giving them as an allotment an one-fourth share.

१४। पितृद्रव्याविरोधेन यदन्यत् स्वयम् अर्जितम्।
मैत्रम् औद्वाहिकञ्चैव दायादानां न तद्-भवेत्॥

क्रमाद् अभ्यागतं द्रव्यं हृतम् अभ्युद्धरेत् तु यः।
दायादेभ्यो न तद्-दद्याद् विद्यया लब्धम् एव च॥

14. Without detriment to the father's estate, whatever else is acquired by a parcener himself, as a present from a friend, or a gift at nuptials, does not belong to the co-parceners. He who recovers hereditary property, which had been lost, shall not give it up to the parceners; nor what has been gained by science.

१५। पूर्वनष्टां तु यो भूमिम् एक-श्चेद् उद्धरेत् क्रमात्।
यथा भागं लभन्तेऽन्ये दत्त्वांशं तु तुरीयकं॥

15. But if a single co-parcener recovers ancestral land which had been formerly lost, the rest may get the same according to their due shares, having set apart a fourth part for him.

१६। सामान्यार्थसमुत्थाने विभागस्तु समः स्मृतः।

16. But if there be an accretion to the joint property (made by any parcener through agriculture, commerce, etc.), an equal division is ordained.

१७। पितृभ्यां यस्य यद्-दत्तं तत् तस्यैव धनं भवेत्।

17. Whatever has been given by the parents, belongs to him to whom it was given.

१८। पितरि प्रोषिते प्रेते व्यसनाभिप्लुतेऽथवा।
पुत्र-पौत्रै ऋणं देयं निह्नवे साक्षिभावितं॥
ऋक्थग्राह ऋणं दाप्यो योषिद्-ग्राहस्तथैव च।
पुत्रोऽनन्याश्रितद्रव्यः पुत्रहीनस्य ऋक्थिनः॥
सुराकामद्यूतकृतं दण्डशुल्कावशिष्टकं।
वृथादानं तथैवेह पुत्रो दद्यान् न पैतृकं॥

18. If the father is dead or gone to a distant place (and not heard of for twenty years), or laid up with an incurable disease, his sons and son's sons shall pay his debts which must be proved by witnesses in case of denial. He who takes the heritage, likewise he who takes the widow, or a son if the estate is not vested in any one else, or the heirs of one leaving no son, shall be compelled to pay the debts. A son is not liable for his father's debts incurred for indulgence in wine, women, or wager, or for unpaid fine or tax imposed on him, or for his promise to make an unlawful gift.

१९। भ्रातृणां जीवतोः पित्रोः सहवासो विधीयते।

19. For brothers a common abode is ordained so long as the parents are alive.

२० । जायापत्योर्न विभागो विद्यते ॥ १६ । पाणिग्रहणाद्धि सहत्वं कर्मसु ॥ १७ । तथा पुण्यफलेषु ॥ १८ । द्रव्यपरिग्रहेषु च ॥ १९ । न हि भर्तुर्विप्रवासे नैमित्तिके दाने स्तेयम् उपदिशन्ति ॥ २० ॥

आपस्तम्बधर्मसूत्रे २ । ६ । १४ । १६—२० ॥

20. "There is no partition (or separation) between husband and wife (16); because from the *taking of hand* (i. e. marriage) companionship (or jointness, of husband and wife) in (religious) acts (is ordained) (17); likewise in the fruits of (acts of) spiritual merit (18); and also in the ownership of wealth (19); since (Manu and other sages) do not declare (the commission of the offence of) theft, in the case of necessary gift (made by a wife, of her husband's property)," (20).

Apastamba's Dharma-Sutras, 2, 6, 14, 16-20.

२१ । भ्रातॄणाम् अथ दम्पत्योः पितुः पुत्रस्य चैव हि ।
प्रातिभाव्यम् ऋणं साक्ष्यम् अविभक्ते नतु स्मृतम् ॥ २, ५२ ॥

21. "Of brothers, also of husband and wife, as well as of father and son, suretyship, indebtedness or witnessing (of one with respect to other) is not ordained (valid), if undivided."—Yajnavalkya ii, 52.

The following is the commentary of the Mitákshará on this text of Yájnavalkya,—

२२ । प्रतिभुवोभावः प्रातिभाव्यं, भ्रातॄणां, दम्पत्योः, पितापुत्रयोश्च अविभक्ते द्रव्ये, द्रव्यविभागात् प्राक्, प्रातिभाव्यम् ऋणं साक्ष्यं च न स्मृतं मन्वादिभिः। अपि तु प्रतिषिद्धं साधारणधनत्वात्। प्रातिभाव्यसाक्षित्वयोः पक्षे द्रव्यव्ययावसानत्वात् ऋणस्य चावश्यप्रतिदेयत्वात्। एतच्च परस्परानुमतिव्यतिरेकेण। परस्परानुमत्या तु अविभक्तानामपि प्रातिभाव्यादि भवत्येव। विभागादूर्द्ध्वं तु परस्परानुमतिव्यतिरेकेणापि भवति।

ननु दम्पत्योर्विभागात् प्राक् प्रातिभाव्यादिप्रतिषेधो न युज्यते। तयोर्विभागाभावेन विशेषणानर्थक्यात्। विभागाभावश्चापस्तम्बेन दर्शितः,—"जायापत्योर्न विभागोविद्यते" इति।

सत्यम्। श्रौतस्मार्त्ताग्निसाध्येषु कर्म्मसु तत्फलेषु च विभागाभावः, न पुनः सर्व्वकर्म्मसु, द्रव्येषु च तथाहि। "जायापत्योर्विभागो न विद्यते" इत्युक्त्वा किमिति न विद्यते इत्यपेक्षायां हेतुमुक्तवान्,—"पाणिग्रहणाद्धि सहत्वं कर्म्मसु तथा पुण्यफलेषु" चेति।

हि यस्मात् पाणिग्रहणादारभ्य कर्म्मसु सहत्वं श्रूयते,—"जायापती अग्निम् आदधीयाताम्" इति। तस्मादाधाने सहाधिकारात् आधानसिद्धाग्निसाध्ये कर्म्मसु सहाधिकारः। तथा "कर्म्म स्मार्त्तं विवाहाग्नौ" इत्यादिस्मरणात् विवाहसिद्धाग्निसाध्येष्वपि कर्म्मसु सहाधिकारएव।

अतश्चोभयविधाग्निनिरपेक्षेषु कर्म्मसु पूर्त्तेषु जायापत्योः पृथगेवाधिकारः संपद्यते। तथा पुण्यानां फलेषु स्वर्गादिषु जायापत्योः सहत्वं श्रूयते,—"दिवि ज्योतिरजरम् आरभेताम्" इत्यादि। येषु पुण्यकर्म्मसु सहाधिकारस्तेषां फलेषु सहत्वम् इति बोद्धव्यम्। न पुनः पूर्त्तानां भर्त्रनुज्ञयानुष्ठितानां फलेष्वपि।

ननु द्रव्यस्वामित्वेऽपि सहत्वमुक्तम्,—"द्रव्यपरिग्रहेषु च, नहि भर्त्तुर्विप्रवासे नैमित्तिके दाने स्तेयमुपदिशन्ति" इति।

सख्यम्। द्रव्यस्वामित्वं पत्न्या दर्शितमनेन, न पुनर्विभागाभावः, यस्मात् द्रव्यपरिग्रहेषु चैत्युक्ता तत्र कारणमुक्तम्,—भर्तुर्विप्रवासे नैमित्तिकेऽवश्यकर्त्तव्ये दानेऽतिथिभोजनभिक्षादानादौ हि यस्मात् न स्तेयमुपदिशन्ति मन्वादयः, तस्माद् भार्य्यायामपि द्रव्यस्वामित्वमस्ति, अन्यथा स्तेयं स्यादिति। तस्माद्भर्तुरिच्छया भार्य्यायामपि द्रव्यविभागो भवत्येव न स्वेच्छया। यथा वक्ष्यति। यदि कुर्य्यात् समानंशान् पत्न्यः कार्य्याः समांशिका इति॥ २।५२॥

22. "Suretyship" is the state of being surety. "Of brothers, of husband and wife, and of father and son," if property be "undivided" *i.e.*, before partition of their property, suretyship, indebtedness or witnessing is not ordained by Manu and other sages ; but on the contrary is prohibited, by reason of (their) property being common, and by reason of the possible expenditure of wealth being the ultimate result in the cases of suretyship and witnessing, and by reason of the repayment of debt being necessary. This, however, is the rule in the absence of mutual consent. But by the consent of each other, suretyship and the like may certainly take place even among the undivided (coparceners). And after partition they may take place even without mutual consent.

It may be objected—that with respect to husband and wife, the prohibition of suretyship &., *before partition*, is not reasonable, by reason of the meaninglessness (in their case) of the qualification "if undivided," as there can be no partitoin between them : and the absence of partition is shown by A'pastamba in the text—"There can be no partition (separation) between husband and wife" : (Text No. 20).

It is true that there is absence of partition (separation) as regards the acts (ceremonies) that are performed by means of the fire ordained in the Sruti or in the Smriti, and as regards their fruits ; but not as regards all acts, nor as regards properties. For, after having declared that—"There is no partition (separation) between husband and wife", (the sage A'pastamba) with a view to answer the question why is there no partition (between husband and wife ?), sets forth the reason (for the same), in the passage—"Because from the taking of hand (*i. e.*, marriage) arises companionship (or jointness between husband and wife) in (religious acts ; likewise in the fruits of (acts of) spiritual merit."

(The meaning of Apastamba's above text is now explained). Because from the time of marriage companionship (or jointness) in (religious) acts is ordained in the text,—'The wife and the husband shall establish the "fire", hence, from the joint right in the establishment (of the fire) follows the joint right in the acts that may be performed by means of the fire made by the establishment : likewise, by reason of the ordinance in the text.—"Acts ordained in the Smritis (shall be performed) in the nuptial fire," there is certainly joint right also in the acts that may be performed by means of the fire made at marriage.

Consequently it follows that as regards the (religious) acts independent of the twofold (consecrated) fire, and as regards charitable acts, the right of husband and wife (to perform the same) is certainly separate (or independent of each other) ; "likewise in the fruits of (acts of) religious merit," such as (blissful abode in) heaven and the like, the companionship (or association) of husband and wife is reveald in the following and other

texts, namely,—"Both shall consecrate undecaying light in heaven." It should be understood that there is jointness in (the enjoyment of) the fruits of only those acts of religious merit, with respect to which there is joint right of performance, but not also in (the enjoyment of) the fruits of charitable acts (though) performed (by the wife) with the permission of the husband.

If it be objected that jointness (of husband and wife) is declared (by Apastamba) even as regards ownership of property in the text—(Jointness of the husband and wife arises from marriage) also in a respect of the ownership of property; because (the sages) do not ordain (the commission of) theft in the case of necessary gift (made by the wife, of the husband's property) in the absence of the husband at a distant place.

Yes, the wife's ownership in the (husband's) property is certainly shown by this text, but not the absence of partition. Because after having declared,—"also in respect of the ownership of property"—(the sage) declared its reason (by saying) because in the husband's absence in a distant place, Manu and other sages do not ordain (the commission of) theft in the case of necessary gift (made by the wife) *i. e.*, gift which must be made, such as feeding of a religious mendicant, giving of alms to beggars, and the like, therefore ownership of the (husband's) property is vested in the wife also, otherwise there would be theft (when such gift is made.) Hence there may certainly be a partition of property, (but) by the husband's desire, and not by her own desire, on which a share is allotted to the wife also (separately from that of the husband), as will be declared (by Yájnavalkya, ii, 116) later on in the text,—"If he makes the shares equal, his wives to whom no *Stridhan* has been given by the husband or the father-in-law, must be made partakers of equal shares": see Mit. 1,2,8.

MITAKSHARA JOINT FAMILY.

The Sanskrit word for Inheritance is *dáya* which is derived from the root *dá* (= Latin *do*) to give, and which primarily means a *gift*. Heritage resembles a gift in this that in the former as in the latter one person's right accrues to another person's property without any valuable consideration. Heritage may also be deemed an implied gift; for, the law of inheritance in a country is moulded and regulated by the feelings of its people, so that if every person of a community could have declared at the time of his death his wishes with respect to the persons that are to take his property, then in the majority of instances the donees would have been the very persons that are declared heirs by the law. The law of inheritance, therefore, may be regarded as the General Will of the Community, and hence heritage may, not improperly, be regarded as gift which the previous owner intended but omitted to make, but which the law relating to the order of succession, gives effect to

by raising a conclusive presumption of such intention, founded on degrees of what are usually called *natural* love and affection, but what are really feelings of sympathy occasioned and determined by the peculiar conditions, exigencies and associations of each society, and may vary in different communities, and also in the different stages of development of the same community, so that what is regarded as quite natural in one, may be deemed contrary to natural justice in another.

Although the origin of the law of inheritance may be traced to the love and affection of the proprietors towards the heirs, yet it must not be understood that the haritable right of an heir does at all depend on the pleasure of the proprietor: and a person being displeased with cannot disinherit the legal heir by simply declaring that he shall not take his estate; for, notwithstanding such declaration, the heir, on whom the law confers the right, would be entitled to take the estate if not validly disposed of in favour of other persons.

Three modes of devolution in Mitakshara.—According to the Mitákshará the estate of a deceased male devolves in three different modes under different circumstances; (1) by *survivorship*, and (2 & 3) by *succession* in two different orders: if a person was *separated* from his coparceners *and not re-united* with any of them after separation, then *succession* in the order set forth in the Mitákshara, Chapter ii, Sections i to vi, applies, if he was *reunited* with any of the coparceners after separation, then also *succession* applies but in the order stated in the Mitákshará, Chapter ii, section ix, and fully explained in the Víramitrodaya, Chapter iv; and if he was not separated at all, then survivorship applies. It is erroneous to suppose that *survivorship* applies to the estate of a *re-united* person, and that *succession* applies to the estate of a person who was *not separated*, and who died leaving behind him no male coparcener but only female coparceners with whom he used to live jointly, and who are entitled to take by survivorship the estate, to which, however, succession is erroneously applied, though it is properly applicable to the property of one who had become separated.

1. If he was a member of a joint undivided family his interest in the joint *ancestral* property and in the accretions to the same, passes by survivorship to the surviving members of the family.

By the term *ancestral* property is to be understood the property of the father and other paternal lineal male ancestors in the male line, to which the right of the son or other male

descendant in the male line, accrues from the moment of his birth or rather conception, and which is on that account, called *unobstructed* heritage. According to the view taken by the Privy Council in the recent case of *Raja Chelikani* v. *Raja Chelikani* (29 I. A., 156, = 7 W.N., 1, = I.L.R., 25 M., 678) it does also include property inherited jointly by two undivided brothers from their maternal grandfather; such property does pass by survivorship as joint ancestral estate, if either of the brothers dies without making partition. This decision overrules the cases of *Jasoda Koer* v. *Sheo Pershad*, I.L.R., 17 C., 33, and *Saminadha* v. *Thangathanni*, I.L.R., 19 M. 70, in which it was held that survivorship was limited to the *unobstructed heritage*, that is, to such property only, to which right accrues by birth.

It is difficult to understand the principle enunciated by their Lordships in this case, in which what was actually held is, that when two full brothers who were members of a Mitákshará joint family succeeded to the estate of their mother's father, and one of them died without leaving male issue, while living jointly with the other, survivorship applied to that estate in which their ownership was that of joint tenants. But there are some expressions which create considerable difficulty. For instance their Lordships observe,—"It is the right to partition which determines the right to take by survivorship." If it implies that the joint heirs must be members of a joint family, who have the right to *partition* in the technical sense, then it embodies an important condition. In another place the maternal grandfather's property in the hands of the grandsons is said to become *ancestral* property. If this be deemed another condition for the application of the decision, then the difficulty may be removed.

Accordingly, a Full Bench of the Madras High Court have after an elaborate consideration of that case, held that members of a joint family succeeding to their mother's *Stridhanam* or to their maternal uncle's estate, take the same as tenants-in-common and not as joint tenants, so they have not the benefit of survivorship : *Karuppai* v. *Sankaranarayanan*, I.L.R., 27 M., 300. See also *Vythinatha* v. *Yeggia*, I.L.R. 27 M., 382

It would seem that survivorship would not apply to the estate if inherited by two or more grandsons by daughters, who are members of different families.

It should be observed that the proposition of law, enunciated

by the eminent Hindu Judge who decided *Jasoda Koer's* case, appears to be perfectly correct according to the true view of the Hindu law, namely, that *survivorship* applies only to property in which right is acquired from birth, and not to property jointly inherited according to the rules of succession. In consequence, however, of the proper materials not having been placed before the Judicial Committee, their Lordships had held that two widows (in *Bhagwandeen Doobey's* case) and two daughters (in *Aumritolall Bose's* case) succeed as *joint tenants*, and there is survivorship between them. The passage of the Mitákshará, providing partition by two or more widows, of the husband's estate inherited by them, is omitted in Colebrooke's translation. Nor was the fundamental doctrine of the Bengal School, namely that co-heirs take as *tenants-in-common* in all cases, and never as *joint tenants*,—brought to their Lordships' notice in the latter case which was governed by the Dáyabhága. There appears to have been another misapprehension, namely, that the *surviving* widow or daughter who takes the share of the deceased, as being the *then nearest heir* of the last male owner, is mistaken to take *by survivorship.*

Justice Bandyopádhyáya (shortened into Banerji, now Sir Gurudas) the learned Hindu Judge who decided *Jasoda Koer's* case had in his mind the true view of Hindu Law when deciding that case, while the Judicial Committee rejected the general proposition propounded by his Lordship as erroneous, inasmuch as the same was in conflict with what had been laid down in those two cases decided by their Lordships, namely, that *survivorship* did apply to the property inherited by *succession*, by two widows and two daughters.

Nor does survivorship apply to property jointly obtained as a gift by two or more brothers living jointly : *Bai* v. *Patel*, I.L.R., 26 B., 445.

It should be observed that the expression *pass by survivorship* is a contradiction in terms ; for the undivided coparcenary interest of a member in the joint property lapses on his death, and therefore nothing *passes* to the survivors whose right to the whole of the family property accrued at the time of their respective birth, and no new right is acquired on the death of a member.

2. If he was separated from his co-parceners and was not subsequently re-united with any one of them, his estate descends agreeably to the rules of succession.

The rules of succession also apply to the self-acquired

and other separate property of a member of a joint family according to the ruling of the Privy Council in the *Shivaganga* case: *Kattama Nachiar* v. *Raja of Shivaganga*, 9 M.I.A., 539 = 2 W.R., P.C., 31.

And conversely the rule of survivorship applies to any joint *ancestral* property (including accretions to the same) which may have been kept joint and undivided at the time of partition of all the rest of the property : *Chowdhury Chintamun* v. *Nowlukho Konwari*, 2 I.A., 263.

The rules of succession will apply, as stated above, to even joint property other than *ancestral* and accretions to the same.

3. If he was re-united with any of his co-parceners after partition, his estate goes according to a certain order of succession, though in some cases it may seem to pass by survivorship which, however, does not really apply to such property.

It should be observed here that although there are good reasons for considering that the different courses of succession to the estate of persons were regulated by their status of being joint or separate or re-united, yet it is now settled by decisions of the Privy Council that the course of descent is determined by the character of the property, so that whether the status of the family be joint or separate, the property which is joint will pass by survivorship and the property which is separate will devolve in a different course according to the rules of succession. The first proposition, however, should be restricted as being applicable only to such joint property as is *ancestral* or accretion to the same.

The joint family system—is a cherished institution of the Hindus and is the peculiar characteristic of their society, of which it is the normal condition. It is only a continuation of the ancient patriarchal form of family government, deprived of its original autocratic rigor by the civilizing influences of later times. Those that are called by nature to live together, continue to do so, with the exception of daughters born in the family, who must pass out of it after marriage, and with the addition of wives of male members, brought from other unconnected families. The Hindu Sástras enjoining brothers to live together so long as the parents are alive (Text No. 19), give a religious sanction to the usage, and are unlike the Christian Scripture ordaining,—"Therefore shall a man leave his father and mother, and cleave unto his wife, and they shall be one flesh,"—which appears to have moulded the struc-

ture of European society in the individualistic mode. Originating in natural love and affection, the joint family depends for its continuance on self-control, mutual sympathy and the spirit of self-sacrifice and forbearance; while its disruption owes its origin to the spirit of selfishness and impatience in some of its members. The system founded as it is on the virtues of sympathy and self-sacrifice, and tending as it does to create a spirit of forbearance and mutual dependence, conduces to the law-abiding and religious character of the Hindus. This system, however, is opposed to the spirit of self-reliance and independence, which distinguishes the people of Europe, and is, on this acconnt, disapproved by some English-educated Hindus who would introduce the European system; but this view of theirs is looked upon by the orthodox Hindus as the outcome of selfishness.

This joint family system is organized on the principle of subordination, and not on that of co-ordination or equality of the members with respect to rank and position. Under it no two persons can be equal, one of them must be superior and the other inferior relatively to each other: an elder brother or cousin is like a father, his wife and an elder sister are similar to the mother; while a younger brother or cousin is like a son, and his wife and a younger sister are similar to daughters; the paternal uncle's wife and the father's sister or cousin are similar to the mother, and so on. Thus the idea of equality is unknown to the Hindu mind with regard to family government and social order; and the title to respect among the members of a joint family depends on age and higher degree of relationship. Superior ability in a junior member is recognised to this extent, that it entitles the member possessed of it to be the head of the family as regards the management of its property, and its affairs and dealings with the outside world,

The Hindus accustomed to live in joint family groups and to be attended and nursed by the members of their family when suffering from disease and the like, do not require the aid of Hospitals; on the contrary they appear to feel an instinctive abhorrence for being tended by strangers in a Hospital; nor do they set much value on the medical treatment provided there, as their religious belief is that "They shall die when they are to die." Accordingly they prefer to be in the midst of the family for the care of their person during illness, and even if a member is attacked by any virulent and

contagious disease, the others never apprehend the slightest danger to themselves from contact with his body, nor are they deterred in the least from touching it and nursing him. For they believe that the span of a man's life is fixed before his birth; and not an inch of life can be added to or deducted from the predestined period, by any human agency. Nothing could be more repugnant and abhorrent to the Hindu mind than the Segregation rules recommended by medical men for preventing the spread of the plague now raging in this country.

The joint family takes care of its young orphans and its old and infirm members. It looks after and guards and protects the wives and children of its absent or deceased members. Under this system violence and cruelty to wives and children are impossible, and old age pension is unnecessary. The system exercises a salutary influence on the mind: as so many persons cannot live together peacefully, without self-control, sympathy, patience and forbearance. Suppression of selfishness is necessary: there cannot be a happier mode of life than under this system, if all the members work for common good, and the comforts and happiness of all be felt by each to be his duty to secure. The members of a joint family do not feel the necessity for making any separate provision for themselves in their old age or for their children, since the family affords shelter and protection to all its members, young or old, and its property is ordained to be the hereditary source of maintenance of all.

The joint family system depends for its continuation on the possession of certain virtues by its members, and fostering as it does the religious spirit it may be called the stronghold of Hinduism. The vitality of the Hindu community is derived from this system which forms the foundation of their religious and spiritual character, the existence of which depends entirely on its continuance. What is noble and good in Hindu character is its effect. The Hindus should preserve and stick to the system. It still prevails in Hindu Society sometimes more in form than in spirit; an exclusively secular education dissociated from religion, now imparted in our schools and colleges, has been undermining the Hindu spiritualism on which the system is founded and on which its continuance depends. This institution like every other, has its advantages and disadvantages, but its advantages are both spiritual and secular, whilst its disadvantages are merely secular in character.

Bred up under this system, the Hindus cannot conceive of a heaven without joint family. The Sapinda relationship in the sense of connection through participation in funeral oblations implies a celestial joint family composed of the *manes* of male and female members of a mundane joint family.

It is, however, worthy of remark that Hindus English-educated at the expense of the joint family, and enjoying the advantages afforded by it, are yet often found so blinded by selfishness, as to be dissatished with the rule of Hindu law, imposing on them certain correlative duties to the family, in return for the diverse benefits received from it. They commit to the family, the care of their wives and children, while they are compelled to reside elsewhere, for the practice, of any profession or in the exercise of any calling, or in service, and are themselves incapable of taking care of them, or think it inconvenient to take them with themselves to the place of business. In fact, they cannot do without the joint family, and cannot sever their connection with it which they are at perfect liberty to do at their pleasure; but at the same time, they are unwilling to participate with the joint family, their earnings, which under the circumstances the Hindu law requires them to do, as being fair and equitable.

It should also be especially noticed in the present connection that India is a very poor country, and even the ordinary expenses of English education here, are out of all proportion to the means of the middle class Hindus. The expenditure necessary to give such education to the smart boys in the family, is regarded as a sort of investment. It is not correct to suppose that the boys are entitled to the expenses of such education from the family, as its natural duty towards them. The indigenous system of education formerly prevailing in this country, was the training imparted by the secular Gurus or pedagogues in the village Páthsálás; and that is what one might say he has entitled to have, at the expense of the family, as ordinary education. But English education should be held to be special training; and the gains by one who has received such education at the expense of the family, should be considered earned with the aid of family fund, so as to become the subject of joint right.

The Topics relating to the joint family—are (1) the members of whom it is composed, (2) different descriptions of property belonging to them, (3) their rights and privileges to and in the family property, (4) management of the family and its pro-

perty (5) alienation of the family property and of the undivided coparcenary interest of a member, (6) debts of the father and of other members, (7) judicial proceedings, (8) devolution of the undivided co-parcenary interest of a member, (9) partition and its incidents, (10) things that are not liable to partition, and (11) legal presumptions.

1.—Members of a joint family.

Males.—The members are males and females. The male members are, (1) those that are lineally connected in the male line, such as father, paternal grandfather, son and son's son, (2) collaterals descended in the male line from a common male ancestor, (3) such relations by adoption, and (4) poor dependants.

Females.—The female members are, (1) the wife or the "widowed wife" of a male member, and (2) his maiden daughter. As a general rule, a married daughter is not a member of her father's family; since by marriage she becomes a member of her husband's family (*Kartik* v. *Saroda*, I.L.R., 18 C., 642); there may, however, be cases in which a married daughter continues to live as a member of her father's family, sometime together with her husband; a widowed daughter also may sometimes come back to her father's family and live as a dependent member thereof.

Poor Dependants.—Some helpless persons mostly poor relations more or less distant, are also maintained as members of the family; the original words for *poor dependants* दीनाः अनाश्रिताः indicate that they are actually getting their subsistence and living under the protection of the family.

The female slave or concubine, and the illegitimate son—mentioned in the commentaries as members of a joint family may now be so, only in very exceptional and rare cases. When slavery was prevalent a female slave would be permanently attached to a family as a dependent member thereof, and a son begotten on her by a male member would likewise be an inferior member. But although there cannot, at the present day, be a female slave in law, there are instances of such in fact, called concubines and living as members of the family of the men keeping them; this we find possible either in the cases of holders of Rajes or big estates, or in the cases of low-caste people: herein the extremes meet, the former are above public opinion, and the latter are below the same. In other cases such conduct would not be tolerated by the other members of a joint family.

Some misconception appears to prevail on this subject. The Hindu commentators treat of an illegitimate son's right while dealing with the partition of a joint family. They evidently mean that only such an illegitimate son, as is a member of his father's family, may get maintenance if the father is of a regenerate class; and a share, if the father is a Sudra. The following texts form the foundation of the law on the subject:—

अनपत्यस्य शुश्रूषुर्गुणवान् शूद्रयोनिजः ।
लभेताजीवनं शेषं सपिण्डाः समवाप्नुयुः ॥ वृहस्पतिः ॥

which means—"The virtuous and obedient son, borne by a Sudra woman to a man who has no other offspring, should obtain a maintenance; and let the kinsmen take the residue of the estate:"—Vrihaspati. This text is explained to refer to a son of a twice-born person by a Sudrá woman not married by him: see Dáyabhága ix, 28.

दास्याम् वा दासदास्याम् वा यः शूद्रस्य सुतो भवेत् ।
सोऽनुज्ञातो हरेद् अंशम् इति धर्म्मो व्यवस्थित: ॥ मनुः ॥

which means—"A son begotten by a Sudra, or on a female slave, or on a female slave of a slave, may take a share (on partition) if permitted (by the father): this is settled law":—Manu. According to a Sanskrit rule of construction the repetition of the particle "or" may be taken to imply "or on any other similar woman."

जातोऽपि दास्यां शूद्रेण कामतोंऽशहरो भवेत् ।
मृते पितरि कुर्य्युस्तं भ्रातरस्त्वर्धभागिनं ।
अभ्रातृको हरेत् सर्व्वं दुहितॄणां सुतादृते ॥ याज्ञवल्क्यः ।

which means—"Even a son begotten by a Sudra on a female slave may get a share by the father's choice; but if the father be dead, the (legitimate) brother should make him partaker of half a share: one, who has no (legitimate) brother may take the whole, in default of (heirs down to) the son of daughters":—Yájnavalkya.

These three texts are cited in the Dáyabhága. The author of that treatise lays down, on the authority of the above text of Vrihaspati, that the son of a regenerate person by any Sudra woman not married by him, is entitled to maintenance; and

then goes on to discuss the law relating to such a son of a Sudra, and begins thus,—

शूद्रस्य पुनः अपरिणीतादास्यादिशूद्रापुत्रः पितुरनुमत्या पुत्रान्तरतुल्यांशहरः।

as the correctness of the rendering by Colebrooke, of this passage has been doubted, it is literally translated thus,—"But of a Sudra a-son-by-a-not-married-female-slave-or-the-like-Sudra-woman, may share equally with other sons, by the father's permission." The words connected by the hyphens stand for a compound word in the original.

Colebrooke's translation is as follows,—"But the son of a Sudra, by a female slave or other unmarried Sudra woman, may, &c." So you see that it is difficult to maintain that Colebrooke's version is wrong, excepting this that the word "unmarried" is ambiguous and may suggest a meaning not intended by the original, namely, that the woman must be a *maiden*, whereas the real meaning is, that she is not married by the man. The two words *Dási* and *Adi* may be done, in either of the above two ways, namely, either into "a female slave or other," or into "a female slave or the like." No Sanskritist would be prepared to say that the first of these versions, which is given by Colebrooke, is wrong; the translation given in *Narain Dhara's* case, I.L.R., 1 C., 1, omits the word "Sudrá woman" altogether.

There is a difference of opinion on this subject between the Calcutta High Court and the other High Courts; the latter hold that an illegiaimate son of a Sudra by a *kept woman* or *continuous concubine* would be entitled to a share under the foregoing texts, while the former takes a contrary view: see *Kirpalnarain* v. *Sukurmoni*, I.L.R., 19 C., 91, and the cases cited therein, and also *Ram* v. *Tek*, I.L.R., 28 C., 194, in which it has been held that a Sudra's illegitimate son not born of a female slave, is not entitled to a share where the father had parted with his interest during his life-time.

It should, however, be observed that two commentators of the Dáyabhága, namely, Rámabhadra and Sríkrishna explain the term "on a female slave of a slave" as used in the above text of Manu, thus,—

दासदास्याम् इति, दासस्य अपरिणीतरक्षितायाम् इत्यर्थः।

which means,—"On a female slave of a slave, means, on one, not married, but kept by a slave." And this somewhat un-

reasonable interpretation is put, as otherwise the sages might be thought to legalise adultery: and its effect seems to be consistent with what is said in the Dáyabhága with respect to the illegitimate sons of regenerate persons.

Hence, if the son begotten by a Sudra on a *kept woman of his slave* be entitled, it follows *a fortiori* that a son begotten by a man on his *own kept woman* should be entitled to a share. So these commentators of the Dáyabhága appear to support the view taken by the other High Courts.

I have already told you that the Hindu lawgivers appear to be anxious to provide a source of maintenance for every person, and therefore also for an illegitimate son. It would be a little too puritanic to deprive one publicly acknowledged as son by the father and his family, on the ground of his being illegitimate; he is not responsible for the manner in which he came into existence.

There does not appear to be any difference on this point between the commentaries of the two schools. If it be contended that in order to entitle an illegitimate son to claim a share, it is necessary that his mother must be a slave, then none would be so entitled, now that slavery has been abolished, and the decisions of the other High Courts (*Ráhi* v. *Govind*, I.L.R., 1 B., 97, *Sadu*, *v. Baiza*, I.L.R., 4 B., 37, *Krishnayyan* v. *Muttusami*, I.L.R., 7 M., 407 and *Hargobind* v. *Dharam*, I.L R., 6 A., 329), as well as the ruling of the the Privy Council in the case of *Jogendro Bhupati*, I.L.R., 18 C., 151, must be pronounced wrong. In fact, however, though not in law, there are women holding the position of a female slave, such as there was in the last case. It should moreover be observed in this connection that the Sanskrit word *Dási* does not necessarily mean a female slave, but may also mean a Sudra woman: and the latter meaning is suggested by the whole context of the Dáyabhága on the subject.

But it should be borne in mind that there is no authority for the maintenance or share of an illegitimate son by a female slave or kept woman or concubine, *unless they are members of the family*. An illegitimate son does not acquire any right by birth to the property of his Súdra putative father, during whose lifetime he cannot claim any share: *Ram* v. *Tek*, I.L.R., 28 C., 194.

The term female slave applied to the illegitimate son's mother implies that she lived as a member of the master's family; and so there could not be any doubt as to the alleged

paternity of an illegimate son. In the case of an illegitimate son by a concubine, however, there cannot be any presumption as to paternity such as arises in the case of the offspring of a married couple, under section 112 of the Evidence Act. A person claiming as an illegitimate son must prove his alleged paternity in the same manner as any other disputed relationship is proved.

An illegitimate son's claim for a share must fail, if it is not shown that the deceased father left any separate or self-acquired property, but died undivided with his own father and brother who took the joint property by survivorship; the illegitimate son could not represent his father in the undivided family: *Gopala* v. *Aruna*, I.L.R., 27 M., 32. But a divided brother is held to be not entitled to succeed in preference to the legitimate son of a predeceased illegitimate son of his brother whose entire separate estate the latter as representing his father is entitled to take in default of any heir down to the daughter's son: *Rama* v. *Pavadai*, I.L.R., 25 M., 519.

When the estate of a person devolves on his father and brother by survivorship, his illegitimate son is entitled to a compassionate maintenance only: I.L.R., 27 M., 32.

An illegitimate son's right to maintenance is a personal right, and is not heritable: *Roshan* v. *Balwant*, 27 I.A., 51. If the illegitimate son's mother be not a Hindu but a Christian, then he cannot claim even maintenance; as he cannot be regarded as a Hindu by birth; since the status as to Dharma or law and religious rites is determined by the mother's caste, therefore he is not governed by Hindu law, his mother not being a Hindu; *Lingappa* v. *Esudasan*, I.L.R., 27 M., 13.

2. *Descriptions of property.*

Classification.—The different kinds of property that may belong jointly or severally to the members of a joint family, may, for different perposes, be classified thus:—

1. Unobstructed and Obstructed heritage.
2. Joint and Separate.
3. Ancestral, Ancestral lost and recovered, and Acquired.
4. Immoveable, Corrody, Moveable and Trade.
5. Partible and Impartible.

There are cross divisions.

Heritage Unobstructed and Obstructed.—Heritage is defined

in the Mitákshará to be that property to which one's right accrues by reason only of his relationship to the previous owner. It is called *obstructed*, where the accrual of the right to it, is obstructed by the existence of the owner; and it is called *unobstructed*, where the owner's existence offers no obstruction to the accrual of the right. A son, a son's son, and any other remoter male descendent in the male line acquire from the moment of their birth or rather conception, a right to the property of the father, the paternal grandfather and other paternal male ancestor in the male line, and such property is, therefore, denominated heritage without obstruction. But when the right of a person arises to the property of his paternal uncle and the like relations, only on their death without male issue, on account of his being their heir, and to which property he had no right during their lifetime, such property is called obstructed heritage, the existence of the owner having offered the obstruction to the accrual of the right.

There is a great distinction between the father's self-acquired property and *ancestral property* or the property inherited by him in regular course of inheritance from his father and other paternal male ancestor in the male line, as regards the son's right by birth to the same, which will be dealt with in the next topic.

It should be noticed that the expression *unobstructed heritage* is a contradiction in terms; for, *Nemo est hæres viventis*: the original word *dáya* cannot be, and should not have been, rendered into *heritage*.

Joint property, Joint-tenants, Co-parceners and Tenants-in-common.—When two or more persons are entitled to the same property in equal or unequal shares it is said to be their *joint property*. The expressions *joint-tenants*, *tenants-in-common*, and *co-parceners* are technical terms of English law used to designate different descriptions of co-owners of joint property, with special incidents. The use of these terms to express co-heirs under Hindu law by reason of analogy in some respect, is often misleading and gives rise to confusion.

For instance, members of a Mitákshará joint family holding ancestral property are called *joint-tenants*, by reason of *unity of possession* and *interest*, and *survivorship*, being common to both. The analogy between them ends there, and does not extend to other incidents.

Joint-tenancy in English law owes its origin to a grant jointly made to two or more persons by a deed or a will: it arises always by *purchase*, never by *descent*.

The English *joint-tenancy* seems to be introduced to this country by the codified law. For instance, Section 93 of the Succession Act, which provides that if a legacy be given to two persons jointly, and one of them die before the testator, the survivor takes the whole,—appears to imply *joint-tenancy.*

The English joint-tenancy and the Mitákshará joint-tenancy differ from each other in many respects.—The former is created by a grant under a deed of transfer *inter vivos,* i.e. by *purchase* and not by *descent*; while the latter owes its origin to *inheritance* only. Under the former each co-tenant is entitled to the *whole,* as well as to his *undivided equal share,* of the property, *i.e.,* the *whole estate* as well as *his own equal proportion* are vested in each *joint-tenant*: but under the latter, the whole estate, not any share of it, is vested in each member, who whilst undivided cannot predicate of the property, that he has any definite share, which again when ascertained by partition is not necessarily *equal*: accordingly, an English joint tenant possesses an absolute power to dispose, by a transfer *inter vivos* but not by a Will, of his own share, and so to put an end to his joint-tenancy; whilst a member of a Mitákshará joint family, having no definite share, cannot alienate his undivided co-parcenery interest, and he cannot destroy the joint-tenancy except by separation which he is at liberty to effect, whenever he chooses.

An English joint-tenancy is said to be distinguished by *four unities,* namely, (1) by unity of *possession* (2) unity of *interest,* (3) unity of *title,* and (4) unity of the *time* of the commencement of such title. Of these, two only apply to a *Mitákshará joint-tenancy* namely, (1) unity of *possession,* and (2) *community* of *interst*: and although *inheritance* is the common name of the title of all the members, still there is not *unity* of the same, nor is there unity of the *time* of its commencement.

Co-parceners, are two or more persons who jointly *inherit* property, whereof they have unity of *possession* which, however, may be severed at any time by partition. There is no *survivorship,* each taking an undivided share, which, on his or her death, goes to his or her heir. The co-heirs and their heirs are called *co-parceners* or *parceners* so long as unity of possession continues.

Tenants-in-common are such co-owners of property as hold it by several and distinct titles, but by *unity of possession.*

The use of these English terms to matters in Hindu law, analogous to them in some respect, may mislead lawyers into

thinking that all the incidents annexed by English law to those terms, apply also under Hindu law.

The students should try to learn and master all the incidents of these terms under the English law, so as to be able to differentiate between them and their use with respect to matters under Hindu law, analogous to them in a particular incident, but dissimilar in others.

Joint—property is of the essence of the notion of a joint family. It consists, (1) of the ancestral property, (2) of the accessions to the same, (3) of the acquisitions with joint funds, and (4) of the self-acquired property thrown into the common stock, when the acquirer allows such property to be treated as family property so as to convert it into joint property: immoveable property lost to the family, if recovered by any member other than the father of the family, is subject to the incidents of joint property, and so is property acquired by the special personal exertion of a member but with the aid of joint funds. In the three last cases the acquirer or recoverer is entitled to a larger share on partition, but in the first of them this distinction does not seem to be observed by the Courts. It is doubtful whether survivorship will apply to joint acquisitions made without the aid of ancestral nucleus; but it has been held that when a family consisting of the father and two sons, is not shown to have had any ancestral property, but it acquired property by joint trade, then in the absence of any indication of intention to the contrary, the property must be presumed to be joint property with the incident of the right of survivorship: *Gopala* v. *Aruna*, I.L.R., 27 M,, 32.

Acquisitions by joint personal exertion.—The joint acquisition by personal exertion only, in the absence of ancestral nucleus, would stand on a somewhat different footing, when made by undivided father and son, from that made by two or more brothers or other collateral *sapindas*, on account of the accrual of a son's right by birth even to the father's self-acquired property, notwithstanding the imperfect character of that right, explained later on. The question that arises for consideration when the acquirers are collateral *sapindas*, is, whether the property is to be deemed as joint property of partners or *tenants-in-common*, or as *joint* family property with *survivorship* and the like incidents.

It should be remembered that as regards even the members of the joint-family, other than the male issue, the separate self-acquired property of a brother or the like, held in severalty, is

always *obstructed heritage*, unless he chooses to throw the same into the common stock. Hence when two or more undivided brothers or other collateral *sapindas* who had not inherited any ancestral nucleus, or had taken no aid from such nucleus if any, acquire and amass wealth solely by their joint personal exertion and skill in carrying on a trade, or otherwise, then it depends entirely on their intention whether they should hold the property as *tenants-in-common* like stangers entering into a partnership, or as members of a joint family, clothing the same with the legal qualities and incidents of joint family property, chief among which is *survivorship*: *Karsondas* v. *Gangabai*, I.L.R., 32 B., 479.

If is difficult to say whether there should be a presumption in favour of the one or the other of the two alternatives. In these days of progress *succession* seems to be preferable to *survivorship*.

Joint inheritance of obstructed heritage.—When two or more members of a joint family jointly inherit, according to the rules of succession, property left by a deceased relation, as obstructed heritage, they hold such property as the *co-parceners* in English law before partition, i.e. the co-tenancy of the co-heirs of obstructed heritage is like *tenancy-in-common*, the right of each extending to his undivided share only, and there being no *survivorship* between them: I.L.R., 27 M., 300 & 382. But the case of *Raja Chelikani* has introduced an exception to this rule by holding that two brothers succeeding to their maternal grandfather's estate hold the same like *joint-tenants* having the benefit of survivorship. It is difficult to understant the principle underlying this decision.

Separate—property of female members is called *Stridhana* which will be separately dealt with. Separate property of a male member consists, (1) of his self-acquired property, and (2) of property inherited by him as *obstructed* heritage according to the rules of succession, excepting however, the maternal grandfather's estate in certain cases. Two or more members may jointly hold separate property as distinguished from the joint property of all the members of the family; for instance, in a family of first cousins, those composing one branch being the sons of one brother, may have property consisting of the separate property of their father and mother, or of property inherited by them from their maternal grandfather, such property though joint between themselves, is separate as regards the rest of the family.

Ancestral—property may be defined thus:—property acquired by a lineal male ancestor in the male line, devolving by inheritance on a son or other male descendant in the male line, becomes ancestral on the death of the ancestor, in the hands of the descendant: *Rajahram* v. *Pertum*, 20 W.R., 189. Property inherited from the maternal grandfather has been held by the Privy Council to become *ancestral* in the hands of the two sons of his only daughter, and they took as *joint tenants* with the benefit of *survivorship*. It is most unfortunate that the true meaning of the term *ancestral property* or rather of the original Sanskrit term which means, property inherited from the *paternal grand-ancestors* in the male line, and cannot include what is inherited from a maternal ancestor,—was not brought to their Lordship's notice. Had that been done, then it seems this *anomaly* would not have arisen. And it has been held by the Allahabad High Court that although the maternal grandfather's estate in the hands of the daughter's sons is called *ancestral*, yet their sons do not acquire a right by birth to such property: *Jamna* v. *Ram*, I.L.R., 29 A., 667.

A share of ancestral property obtained by partition continues to be ancestral in the hands of the coparcener getting the same: *Adurmoni* v. *Chowdhry*, I.L.R., 3 C., 1. So also when such share is obtained according to a distribution made by a deed of gift (*Muddun* v. *Ram*, 6 W.R., 71), or by a will, executed by the ancestor (*Tara* v. *Reeb*, 3 M.H.C.R., 50, *Nana* v. *Achrat*, I.L.R., 12 B., 122), it retains its character of ancestral property, except when the gift is made in terms clearly showing an intention that the donee should take an absolute estate for his own benefit only: *Jugmohandas* v. *Mangaldas*, I.L.R., 10 B., 528, 576. Otherwise, the ancestral nature of the estate is to be presumed: I.L.R., 24 M., 429. It is doubtful whether the presumption should not be in favour of the devise by father of his self-acquired property to sons, becoming their *self-acquired* property: 12 B., 122; *Parsotam* v. *Janki*, 29 A., 354.

Accretions to ancestral property, by purchase with the income thereof, or otherwise, are deemed ancestral; I.L.R., 10 B., 580; *Umrit* v. *Gouree*, 13 M.I.A., 542 = 15 W.R., P.C., 10.

The Sanskrit word for *ancestral* is पैतामह meaning, "belonging to पितामह *pitámaha*." This word पितामह though it is ordinarily applied to the father's father, means in the plural number, all the paternal male ancestors of the father in the male line, how high soever; accordingly ब्रह्मा,—God the Creator,—is

called सर्व-लोक-पितामह—meaning *grandfather* or *grand-ancestor of all persons* ; and the names of the great-grand-father and other ancestors are formed from that term by affixing some particle and words as प्र-पितामह वृद्ध-प्र-पितामह, अति-वृद्ध-प्र-पितामह, and so on.

Ancestral, lost and recovered.—Ancestral property lost to the family, when recovered by the father is deemed his self-acquired property as against his sons. But when it is recovered by any other member solely by his own exertion, then, if the property be moveable, it becomes exclusively his own ; but if it be immoveable, he is entitled to a quarter share as his remuneration for the exertion in recovering it, and the residue is to be shared by all the members including him.

Acquired—property may be subdivided into, (1) what has been acquired with the ancestral funds, *i. e.*, accessions to the family estate, (2) what has been acquired with the aid of joint ancestral funds but by the special personal exertion of any member, (3) what has been acquired by the joint exertion of all the members,—the exertion need not be of the same kind, for instance, if of two brothers one goes out to a distant place and earns money there, and the other remains at home in charge of the family and the property of both, to take care of them, then any property acquired with the money earned by the first brother must be regarded as joint acquisition by both, (4) what has been acquired entirely by the personal exertion or influence of a member without any aid from, or detriment to, joint funds, or what is called self-acquired property, and (5) self-acquired property allowed by the aquirer to be enjoyed by all the members in the same manner as if it were joint property, and so thrown into the common stock : *Ram* v. *Sheo*, 10 M.I.A., 490, 505 ; *Lal* v. *Kanhaia*, 34 I.A., 65.

Money acquired by a member at his marriage has been held to be his self-acquired property : *Adhar* v. *Nabin*, 12. W.N., 103.

Savings of an impartible estate by a holder of such estate during his incumbency, and property acquired with the same, are considered as his separate or self-acquired property : *Maharaj* v. *Rajah*, 5 M.H.C.R., 31 ; *Kotta* v. *Bangari*, I.L.R., 3 M., 145, *Srimati* v. *Jagadis*, 29 I.A., 82 = I.L.R., 29 C., 433.

Property acquired by a member by inheritance from a collateral relation, after litigation carried on with money taken from the large floating balance of the family business, is held to be *self-acquired*, the money being taken as borrowed and subsequently replaced : *Bachoo* v. *Dharam*, I.L.R., 28 A., 347.

Wealth gained by a member of a joint family cannot be

regarded joint by reason only of his having been maintained and educated at the expense of the family funds (*Dhunookdharee* v. *Gunput*, 10 W.R., 122), unless it is acquired by the practice of a profession for which he received a special training at the family expense, and falls within what is termed *gains of science*: *Lakshman* v. *Jamnabai*, I.L.R., 6 B., 225 (242); *Krishnaji* v. *Moro*, I.L.R., 15 B., 33.

Immoveable—property is of very great importance in India where agriculture is the chief source of wealth of the people. The landed property of a family is looked upon as the hereditary source of maintenance of its members present and future, and Hindu law imposes restrictions against its alienation which is prohibited as a general rule, and is permitted only in very exceptional circumstances. The rule against alienation appears to be salutary in character, having regard to the exigencies of Hindu society, but it is being modified by our courts of justice to a great extent.

Corody—is the rendering given by Colebrooke of *nibandha* which means, what is settled or a settlement: it is according to the Mitákshará (1, 5, 4 and Vir. 2, 1, 13) an interest issuing out of land such as a royal grant or assignment to any person, of the king's share of the produce of any land, in part or whole. It is explained in the Dáyabhága (2, 13) to mean what is settled to be given as an annuity.

Moveable—property is not regarded so important as immovable, by Hindu Law which allows therefore a greater freedom with respect to the alienation of the same.

A joint family trade—is a species of ancestral-joint property in which every member of a Mitákshará joint family acquires by birth an interest, in the same way as in other kinds of property: they become not only *co-parceners* but also *co-partners* of the trading firm. The joint family trading partnerships appear to differ from ordinary partnerships in two respects, namely, (1) it is not dissolved by the death of any member and (2) a member of the family becomes a *co-partner* by operation of law. Not only the assets of the trading business but all kinds of the joint family property would be liable for losses, or for debts incurred for the purposes of the trade by the managing members who are the accredited agents of the whole family. And no member can say that his interest in the family property should not be made liable for the losses suitained or for debts incurred subsequent to his birth and during his infancy.

A learned Judge of the Calcutta High Court has held that although a trade is descendible among Hindus, like other personal property, yet it does not follow that a Hindu infant who by birth becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading partnership carrying on the business: he can only become a member of the partnership by a consentient act on the part of himself and his partners: *Lutchmanen* v. *Siva*, I. L. R., 26 C., 349, 354.

Accordingly, it has been held that where a member of a joint family carrying on an ancestral family trade, did upon attaining the age of majority completely sever his connection with the family business, and it was not shown that he did ever ratify any of the transactions entered into by the family firm, then although such member's interest in the joint family property could, on failure of the family business, be made liable for its debts, yet he could not be made personally liable: *Bishambhar* v. *Sheo Narain*, I.L.R., 29 A., 166. Nor can such member's separate property acquired after his separation from the family and the family business,—be made liable for the debts of the trading firm: *Bishambhar* v. *Fateh*, 29 A., 176.

When a member of a joint family carries on a trade by himself or in partnership with a stranger, and contributes the capital from his separate fund, then he alone is interested in the firm and the profits are exclusively his own. The mere fact that a person carrying on a business is a co-parcener in a joint family, it does not necessarily follow that all his co-parceners are his partners in that business. The fact of partnership must be proved by evidence showing that all the members had agreed to combine their labour, skill or wealth in the business and share the profits and losses of the same: *Vadilal* v. *Shah*, I.L.R., 27 B., 157.

But when the member entering into partnership with a stranger contributes the capital from the joint family fund, then as between himself and the other members of the family he is to be deemed the representative of the family in the firm, and his share of the profits and the assets belong to the family, not to him alone. But a difficult question arises in such cases as to the rights of the other members of the family, and of the descendants of the partner member as against the stranger partner, in the absence of express agreement. Are they to be deemed to become partners as a matter of law during the lifetime, as well as after the death, of the partner member? But it

should be noticed that only persons having confidence in each other, agree to enter into a contract of partnership, the effect of which is that every member becomes an agent of the others and as such is authorized to bind them by his acts relating to the partnership business. Hence in the absence of an agreement the stranger partner is not bound to recognise any member of the family other than his partner as having any interest in the firm. And the partnership must be dissolved on the death of that member, whose share of the profits in his lifetime and of the assets after his death may be claimed by all the members of the family as between themselves. No person can be introduced into a partnership business without the consent of all the partners.

3 *Rights and privileges.*

Right by birth of sons, son's son, and the like.—A son or any other male descendant in the male line acquires from the moment of his birth, an interest in the ancestral estate in the hands of the father or the grandfather, which is co-equal to that of the latter in character, and also in extent as regards the father, but not so as regards the grandfather when the father is alive or when there is any other co-heir claiming through the father.

Right by birth to self-acquired property.—According to the Mitákshará, a son or the like descendant acquires from his birth, a right also to the self-acquired property of the father or other paternal ancestor in the male line, the character of this right, however, materially differs from that acquired in ancestral property.

Ownership in Hindu Law.—Ownership or rather co-ownership has a peculiar meaning in Hindu Law; persons entitled to some of the rights that constitute *ownership* or *dominion* or *property* in modern jurisprudence, are called *co-owners* in Hindu law, of the person having all the rights included in *ownership*: the wife is declared to become *co-owner* of the husband from the time of their marriage (*ante* p. 187), the male issue are declared to become from their birth, *co-owners* of their father and grandfather as regards even their self-acquired property, (Mit., 1, 1, 3), and the junior members of a joint family having an *impartible raj* or estate are deemed *co-owners* of the member who alone is entitled to hold the *raj* or estate during his life. The wife and the male issue hold a subordinate position with respect to the ownership of the

property of the husband, and of the paternal ancestors, respectively. And so do the junior members, relatively to the holder of the impartible Raj or estate.

It should be observed that neither the wife, nor the son, nor the junior member, can enforce partition of the husband's property, or of the father's self-acquired property, or of the impartible estate, respectively; though in the first two cases partition may take place, on which they are entitled to get shares. Nevertheless they are regarded *co-owners* in Hindu Law, according to which therefore *right to partition* is not a *necessary* incident of ownership; nor is right of alienation, so.

Ownership, therefore, has two senses in Hindu law, which may be called *perfect* and *imperfect* respectively. The ownership of the wife, the son, and the junior members, stated above, is *imperfect*, as it has not all the rights incidental to full ownership. Their ownership is acknowledged, as they use and enjoy the property in the same way as co-owners, and are entitled to have their maintenance out of the property, and are also entitled to the benefit of survivorship. They cannot, however, enforce partition, nor alienate their right, nor can they prevent alienations, if made for legal necessity, and even in the absence of the same, provided their *right to maintenance* out of the property be not affected thereby; this right being the incident of their co-ownership, forms a legal charge on the estate, according to the true intent of Hindu law.

No limit as to degrees of descent.—A male descendant in the male line, however low in descent, acquires a right by birth to both ancestral and self-acquired property of a paternal ancestor. Suppose A holds ancestral property and a son B is born to him, then B and A are co-sharers with co-equal rights; a son C is born to B and acquires an interest in the property in the same way as another son of A; similarly a son D of C would be a co-parcener; and likewise D's son E would acquire a similar interest and on the same principle, and so on. If the three intermediate descendants were to die during the lifetime of A, E's rights would not be in the least affected by that circumstance. The same rules apply also to the self-acquired property of a paternal ancestor, to which right arises by birth.

But the rule is different if the paternal ancestor is separated from his descendants, and not reunited with any of them; for, then the rules of *succession* and *inheritance*, and not the *co-parcenary* rules, would apply to the property of the

separated father or other paternal ancestor, according to which in default of male descendants in the male line down to the *third degree,* the widow, daughter and the like heirs succeed in the order explained in the Mitákshara Ch. ii, Sections 1-vii. Hence, if there is no son, or grandson, or great-grandson alive at the time of his death, but there is a great-great-grandson, then the latter would be excluded by many other heirs, such as the widow and the like relations who are entitled to take the estate of the *separated* person, in default of male issue down to the *third* degree, according to the rules of *succession* governing the devolution of such property. But it should be borne in mind that this rule restricting the descent to *three* male descendants only, and excluding the fourth, does not apply to a joint ancestor's property to which right by birth accrues and which is joint family property, to which *survivorship,* and not *succession,* applies. This is an important distinction, sometimes lost sight of.

Posthumous son, conception, and adoption.—A son or the like descendant in the womb of his mother at the time of the death of his father, from or through whom he would acquire a proprietary right by birth if he were in existence during his father's life, becomes entitled to the same right if he comes into separate existence subsequently, his birth relating back to the time of his father's death. The Hindu law makes this concession only in favour of the male descendants in the male line, in whom the father and other paternal ancestors are supposed to be reproduced, and accordingly, who take an immediate interest in their property, and as such are heirs *par excellence* or rather co-heirs, for whom their property is designed as the natural hereditary source of maintenance.

Hence a son and the like may be said to acquire the right from the moment of their conception; but it is absolutely necessary that the child *in embryo* should be born alive or come into separate existence, in order to be invested with the right; for, the course of inheritance cannot be diverted by the mere fœtal existence of a child not born alive; and no person can claim an estate, as heir of a still-born child. But a child in the womb is not entitled to all the rights of a child *in esse*: a son's right of prohibiting an unauthorized alienation by the father, of ancestral property cannot be exercised in favour of an unborn son (*Mt. Goura* v. *Chummun,* W.R., Gap. No. 340,) nor is the existence of a son *in embryo* a bar to adoption: *Hanmant* v. *Bhima,* I.L.R., 12 B., 105.

This rule, which is applicable only to the proprietor's male issue, the greatest favourite of Hindu law, has been extended to other heirs taking by succession, not upon the ground of there being any clear authority in Hindu law, but on the ground that the principle has been adopted by the modern systems of jurisprudence : in *Biraja* v. *Naba Krishna*, Sevestre's Reports, 238, the sister's son *in embryo* at the time of the maternal uncle's death, was held his heir. But it should be observed that all relations other than male descendants, are not really heirs *expectant* : they can take only in the contingency of default of male issue, and for them the inheritance is but a windfall. Besides, any other son subsequently born of that sister would not be entitled.

The great distinction between the male descendants and all other heirs is that the former are deemed as the ancestor's consubstantial or own selves reproduced, and as such are entitled to become their co-heirs and co-parceners from birth, whereas the latter are entitled to become heirs after the death of the proprietor without male issue; and that the former confer spiritual benefit by their very existence, while the latter cannot do so, although that doctrine is nowhere invoked by the Mitákshará while dealing with inheritance.

Adoption is tantamount to birth in the adoptive family, and the adopted son acquires, from the moment of his adoption, an interest in the ancestral as well as the self-acquired property of his paternal ancestors by adoption.

Character of father's and son's interest in ancestral property.—The character and the extent of the interest taken by a son in the ancestral property does not differ from those of the father's except so far as they are affected by the son's liability to father's debts.

The following page of the judgement of the Privy Council in *Surajbunsi Koer's* case (I.L.R., 5 C., 148), should be read in this connection :—

"That under the law of the Mitákshará each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable. Upon the questions whether he has the same rights in the self-acquired immoveable estate of his father, and what are the extent and nature of the father's power over ancestral moveable property, there has been greater diversity of opinion. But these questions do not arise upon this appeal. The material texts of the Mitákshará are to be found in the 27th and following slokás of the first section of

the first chapter. It was argued at the Bar that, because in the third sloká of the above section, it is said that the wealth of the father becomes the property of his son, in right of their being his sons, and that 'that is an inheritance not liable to obstruction', their rights in the family estate must be taken to be only inchoate and imperfect during their father's life. and in particular that they cannot, without his consent, have a partition even of immoveable ancestral property. There was some authority in favour of this proposition, notwithstanding the texts to the contrary, which are to be found in the Mitákshará itself (see slokás 5, 7, 8, 11 of the 5th section of the first chapter). But it seems to be now settled law in the Courts of the three Presidencies, that a son can compel his father to make a partition of ancestral immoveable property. On this point it is sufficient to cite the cases of *Laljeet Singh* v. *Rajcoomar Singh*, 12 B.L.R., 373, and *Raja Ram Tewary* v. *Luchman Persad*, B.L.R., F.B.R., 731, decided by the High Court of Calcutta; that of *Kaliparshad* v. *Ramcharan*, I.L R., 1 A., 159, decided by the High Court of North-West Provinces; that of *Nagalina Mudali* v. *Subbiramaniya Mudali*, 1 Mad. H.C.R., 77, decided by the High Court of Madras; and the case of *Moro Vishwanath* v. *Garnesh Vithal*, 10 Bom. H.C.R., 444, decided by the High Court of Bombay. The decisions do not seem to go beyond *ancestral* immoveable property.

"Hence, the rights of the co-parceners in an undivided Hindu family, governed by the law of the Mitákshará, which consists of a father and his sons, do not differ from those of the co-parceners in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindu law imposes upon sons, and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate."

Distinction between ancestral moveable and immoveable.—Although sons acquire a co-equal right by birth to ancestral property, both immoveable and moveable, yet a passage of the law (Text No. 2) declares the father to be master of the moveables by reason, perhaps, of the character of the property and of the superior position of the father relatively to the sons. There appears to be a conflict of opinion with respect to the father's power of disposal of ancestral moveables, owing to the seeming conflict bttween two passages of the Mitákshará, Ch. I, Sect. 1, § 21 and § 27, the first of which seems to deal with

the legal power, and the second with the moral duty. According to one view the power is limited only by his own discretion; and according to the other, the power is not absolute but can be exercised only for family necessity and certain prescribed purposes. A bequest by a father to one of his two undivided sons of the bulk of ancestral moveables, to the exclusion of the other, has been held to be invalid, as being an unequal distribution prohibited by Hindu law; *Lakshman* v. *Ram*, I.L.R., 1 B., 561, affirmed by the Privy Council—*Lakshman*, v. *Ram* I.L.R., 5 B., 48 = 7 I.A., 181. The Hindu law seems to contemplate alienation to strangers, while conferring on the father the power of disposal in question, and not an unjust and undue partiality to a co-heir: for the power is subject to the theory that the sons are co-owners of the moveable property, with the father; the co-ownership therefore should prevail when the question arises between the co-owners and no outsider is concerned.

Son's right in father's self-acquired property.—It has already been said that according to the Mitákshará a son acquires a right by birth to the father's self-acquired property in the same way as to ancestral property (Mit. 1, 1, 27). But the father is competent to alienate the same, and the son has no right to oppose as in case of the ancestral property, the reasons assigned being that the father has a predominant interest in it, and that the son is dependent on him (Mit. 1, 1, 27 and 1, 5, 10). The father, however, cannot make an unequal distribution of it, except in the mode of assigning specific deductions to the eldest son, and so forth (Mit. 1, 2, 1). Nor can the son enforce a partition of the same against the father's choice, as he can in the case of ancestral property.

On a consideration of all these somewhat seemingly inconsistent propositions, it would appear that the father is authorized to make a sale or the like transfer to an outsider, but he is not allowed to show an undue and capricious partiality to any one son to the injury of another.

It has been held by our courts that the father is competent to sell his self-acquired immoveable property without the concurrence of his sons (*Muddun* v. *Ram*, 6 W.R., 71), and to make a gift to one son, to the injury of the other (*Sital* v. *Madho*, I.L.R., 1 A., 394), as well as to make an unequal distribution among his heirs (*Bawa* v. *Rajah*, 10 W.R., 287) or a gift by a Will, which when made to a son, is taken by him as

purchaser under the Will, and not by inheritance: *Jugmohandas* v. *Mangaldas*, I.L.R., 10 B., 528, (578); *Parsotam* v. *Janki* 29 A., 354. But in the absence of words indicating a contrary intention, the property is presumed to retain its ancestral character. I.L.R., 24 M., 429.

But an affectionate gift by the father to a son, of his self-acquired property, is to be distinguished from a gift amounting to an unequal distribution of it, which ought to be held invalid for the very same reasons as in the case of ancestral moveables.

It should, however, be borne in mind that such property, if undisposed of by the father, is taken by the sons and the like, by survivorship, and not by descent.

It has already been said that the right of a son to the father's self-acquired property may be called an imperfect one, but it has been made more so by our courts, by holding that the father is competent to make testamentary disposition (wholly unknown to Hindu Law) of such property, and so deprive a son wholly or partially.

Wife's right to husband's property.—The *Patni*, or lawfully wedded wife, acquires from the moment of her marriage a right to everything belonging to the husband, so as to become his co-owner. But her right is not co-equal to that of the husband, but is subordinate to the same, and resembles the son's right to the father's self-acquired property. The husband alone is competent to alienate the same, and the wife cannot interdict his disposal, but being dependent on him must acquiesce in it, provided it does not unjustly affect her right to maintenance out of it. Nor can the wife enforce a partition of the property. But it is by virtue of this right that the wife enjoys the husband's property, and is entitled to get maintenance out of it; and it is also by virtue of this right that she gets a share equal to that of a son, when partition takes place at the instance of the male members. See *ante* p. 187, and I.L.R., 2 A., 315; 23 A., 86. Thus the wife also, of a male member becomes a coparcener* of the family property.

Unmarried daughter's right.—Similarly, an unmarried daughter acquires an imperfect right in the father's property, by virtue of which she enjoys the same and is maintained out of it until marriage, and is also entitled to a quarter share if partition takes place before her marriage, that is to say, when she continues a member of the family.

Reason for recognising these imperfect rights.—A person's son, wife, unmarried daughter and the like dependent members living jointly with him, use and enjoy his property. This is accounted for by the Hindu lawyers by assuming a right in them; otherwise, they should be guilty of theft or misappropriation every time they use the property, by taking food, giving alms, and the like. The sons again continue to live with their father even after marriage which is brought about by the father himself and not by them, and the father's property is accordingly, by immemorial custom, looked upon as the source of maintenance of the sons' wives and children, and is, by the father's conduct, rendered common to all the members of his family, in the same manner as self-acquistion of a member is thrown into the common stock.

There is good reason, therefore, for curtailing the father's power of voluntary alienation (see Mit. on gifts) and unequal distribution of his self-acquird property, and so of depriving a dependent member of the means of his livelihood.

Joint family property, right and enjoyment.—From what has been said above, it appears that a member of a joint family, whether male or female, acquires a right to the joint property on his or her becoming a member by birth, adoption or marriage; and conversely his right ceases on his or her ceasing to be a member of the family by death, adoption or marriage. The property belongs to the family: any one acquiring and retaining the status of being its member exercises certain rights over the family property, and his rights cease on the extinction of that status. A joint family, therefore, is like a corporation: individual rights are all merged in the family or the corporate body. Every member, male or female, has the right to enjoy the family property without any restriction. A member entitled to get the least share on partition, may, by reason of having a large family of his own to support, consume, during jointness, the largest portion of the proceeds of joint property, without being liable to be called upon to account for the excess consumption at the time of partition. The question of shares does not arise before partition: no member can bring a suit for his share of the profits of joint property so long as the family is joint: *Pirthi* v. *Jowahir*, I.L.R., 14 C., 493.

The following observations of the Judicial Committee in *Appovier's* case (11 M.I.A., 75), should be carefully read in this connection:—

"According to the true notion of an undivided family in

Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

Extent of right, or share, vesting and divesting.—The extent of a member's right in the family property, or the share to which he is entitled cannot be ascertained before partition, for it is liable to variation by birth or death of members, it is increased or diminished respectively by the disappearance or addition of a co-heir.

It is worthy of remark in this connection that the strict rule of vesting and divesting, such as is laid down in the Blindman's son's case and the Unchastity case, does not apply to a Mitákshará joint family in which partial vesting and divesting continually take place on birth, adoption, marriage, or death of a member. There is, however, a conflict of decisions on the question whether a member is divested of his coparcenary interest by subsequent disqualifications, such as *insanity*: see *Ram* v. *Lalla*, I.L.R, 8 C., 149 & *Ram* v. *Ram* 8 C., 919 and *Tirbeni* v. *Muhammad*, 28 A., 247.

But the amount of share to which a particular member would be entitled if partition were to take place at a particular time, may be ascertained by having regard to the rules of distribution, the principles of which are:—(1) that the division among the descendants of the common ancestor is to be made *per stirpes* and not *per capita*; (2) that the first division must be made by dividing the partible property into as many share as would satisfy the claims of the members entitled to partici-

pate, such as the common ancestor, his wife or wives, and his sons and their descendants,—the individuals composing each of the different branches descended from the common ancestor, together getting one share;* and (3) that the partition may stop by the division of the branches, or if a member of a branch desires, the share so obtained by that branch is to be subdivided between its members on the same principles, *i.e.*, between the common ancestor of that branch, his wife, and each of the sub-branches descended from him, the members of it collectively getting one share and so on.

History of father's and sons' right.—In ancient Hindu Law, as in Roman Law, the father of the family, or *pater familia*, was the absolute master of the family property, and of the person of its members; the *patria potestas*, or the authority with which the father of the familly was armed by ancient law extended to the power of inflicting punishment of death, and to absolute dominion even over the acquisitions of its members. Thus Manu (viii, 416) says :—

भार्य्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।

यत् ते समधिगच्छन्ति यस्यैते तस्य तद्-धनं ॥ ८,४१६ ।

which means,—"A wife, a son, and a slave, these three are ordained incapable of holding property: whatever wealth they earn, becomes his whose they are".—viii, 416.

The exercise of absolute power by an autocrat, in the government of a family as of a State, may be cheerfully submitted to, if it is made with an eye to the happiness of all the governed, without partiality, and consistently with the principles of equity, justice and good conscience. But ineqality of treatment owing to caprice or whims, undue partiality or favouritism to one, to the injury of others, and undeserved severity or leniency in the award of punishment, would render such government unpopular, and the curtailing of the power desirable. The usage of polygamy appears to have been a fertile source of discord in a family, and an old father under the undue influence of a young wife, would be betrayed into acts injurious to her stepsons. This furnishes us with the reason why unequal distribution among sons is prohibited in respect of property, of which alienation is allowed. There must have been frequent abuse of the particular power, by fathers, amounting to a crying evil for which a remedy was felt necessary. Accordingly the Mitákshará curtailed it

* L—28.

by admitting the son's right by birth as explained above, and by conferring upon sons co-equal rights in ancestral property, as well as by restraining unequal distribution, while permitting alienation, of moveables and self-acquired property

This doctrine of the son's right by birth to ancestral property, introduced by the Mitákshará as a remedy against the abuse of the father's arbitrary power, is found in many instances to be attended with grave evils of a different description. Head-strong and prodigal youths sometimes foolishly quarrel with their father, take their shares by partition, and dissipate the partimony in no time; and then the fathers have to save those sons and their families from starvation, with the diminished means at their disposal. The author of the Dáyabhága appears to have, therefore, made a change in the law by laying down that the sons have no right to the ancestral property during the lifetime of the father; but at the same time he laid down for the protection of the sons, that the father has no power of disposal over the bulk of the ancestral property except for legal necessity, so that the estate taken by the father in the ancestral property, is, under the Dáyabhága, similar to the Hindu widow's estate in property inherited from the husband.

But by what appears to be an improper application of the doctrine of *Factum valet* our courts of justice have again thrown the sons completely at the mercy of the father, as they were by the ancient law. This change does not seem to be detrimental to the interests of sons except when the father is a spendthrift, or is entirely merged in a young wife, and under her undue evil influence perpetrates the grossest iniquity to his sons by any other wife.

4. *Management.*

Joint family manager's position.—The affairs of a joint family corporation, consisting as it does of Purdanashin ladies and infants, cannot be managed by all the members of it, nor are they managed jointly by all the adult male members, probably by reason of the inequality in their rank, but ordinarily they are, by the tacit consent of all, managed by a single male member who becomes the head of the family, by reason of his seniority and superior rank, and is called the *Karta* (*actor* or *agent*) of the family.

The *Karta* of a family is entitled to manage not only the family properties in which the family has a beneficial interest,

but also properties absolutely dedicated to charities, of which the management only is vested in the family. The *Karta* alone being the senior member is entitled to exercise the right of management as the representative of the family, so long as it remains undivided, and in the absence of any agreement, no junior member is entitled, until partition is effected, to claim the management of the charity properties by rotation, on the ground of convenience : *Thandavaroya* v. *Shunmugam*, I.L.R., 32 B., 167.

Although the *Karta* of a joint family administers its properties for the purposes of the family as its accredited agent, yet so long as he does so manage its affairs, he is not under the same obligation to *economise* or to *save* as would be the case with a paid agent, or partner in trade, or a trustee. He, as the head of the family, has control over the income and expenditure and is the custodian of the surplus if any. If he manages the family affairs honestly and in an unselfish manner, no objection can be taken on the ground that expenses were incurred by him in an extravagant scale, nor is he liable to be called upon to defend the propriety of past transactions : *Bhowani* v. *Juggernath* 13 W.N., 309.

A *Karta* is competent to pledge the credit and the property of the family for the purposes of the family, and therefore for the purposes of an ancestral business which he has to manage. But he cannot do so for the purpose of embarking in a business that is not ancestral : *D. McLaren* v. *Verschoyle*, 6 W.N., 429, 458.

Father manager.—"The father is in all cases naturally, and in the case of infant sons, necssarily, the manager of the joint family estate." The relative position of the father and the sons in a joint family is still regulated by the ancient rule that sons are dependent on the father (Mit. 1, 5, 9 and 10), with whom the government of the family rests, and whose word is still the law as regards the management of the affairs of the family. Although the sons are co-owners with the father, of the ancestral property with co-equal rights, yet so long as they continue to live joint with the father and do not enforce a partition which they are at liberty to do whenever they please, they cannot interfere with the father's management of the family and its property. They have no doubt the power of interference in the case of an unauthorized alienation by the father of ancestral immeveable property, but their enjoyment of the same is subject to other dispositions lawfully made by him, and if dissatisfied, the son's remedy is

partition. Accordingly, a suit for ejectment brought by a father against his son who had against the will of the father taken possession of a house vacated by a tenant, which was partly ancestral and partly the father's self-acquired, has been allowed, and it has been held that, "while the son's interest is proprietary, it lacks the incident of dominion," when the son lives jointly with the father: *Baldeo* v. *Sham*, I.L.R., 1 A., 77.

The father has the power of disposal over property other than immoveable: (Mit. 1, 1, 27) and consequently also over the income of the family property. We have already seen that there is a difference of opinion with respect to his disposal of the ancestral moveables, p. 212.

When the other members are minors, the manager whether the father or a brother, may make a sale, mortgage or the like alienation of joint immoveable property, which is rendered necessary by any calamity affecting the whole family, or by the support of the family, or by indispensable religious duties such as obsequies of the father: (Mit. 1, 1, 28 and 29).

The father's power of alienation of the family property has been considerably extended by modern decisions purporting to be founded on the doctrine of the son's liability to pay off the father's debts. These decisions have practically changed the Mitákshará doctrine of the co-equal ownership of father and son in the ancestral property. These decisions are really, though not professedly, based on the following principle:—Sons cannot have a better friend than their own father, when, therefore, a father of even adult sons living with him, raises money by alienating property or otherwise, he must always be presumed to have done so for the benefit of the family, unless it can be proved by the sons that the father was addicted to wine, women or wager, and the money was wanted for these illegal or immoral purpose. I shall return to this subject when dealing with the topics of Alienation and Debts.

Manager other than father.—It often happens that the eldest son is allowed by the father to look after the affairs of the family under his direction, and sometimes he becomes the *kartá* even during the lifetime of the father who is old and incapable, or religiously disposed and unwilling to remain concerned with worldly matters. When the father is no more, the eldest brother generally becomes the manager or *kartá*, and sometimes a younger brother who is capable governs the family. It is seldom, if ever, that a manager is elected by all the members

or even by those that are adults, or that more members than one act as joint managers of a family. Although there is nothing to prevent any member from taking part in the management, yet as a general rule one member only acts as the *kartá* or managing head of the family.

His power of alienation when other membres minors.—It has already been said that the manager alone is competent to charge or alienate family property for a family purpose, when the other members are minors. The power of a manager for an infant to charge his property is a limited and qualified power as is pointed out by the Privy Council in the leading case of *Hunooman Prasad Panday*, 6 M.I.A., 393, thus:—"It (the power) can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *boná fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. Their Lordships think that the lender is bound to enqnire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting, in the particular instance, for the benefit of the estate. But they think that if he does so enquire, and acts honestly, the real exitence of an alleged, sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money."

This passage should be cerefully read, as it enuniates a very important general principle applied also to other cases such as an alienation by a Hindu female, of property in which she has a Hindu widow's estate, and it has been adopted and embodied by the Legislature in Section 38 of the Transfer of Property Act IV of 1882.

When other members majors.—As to the power of the manager when the other members are majors, the law is thus explained by Justice R. Mitra after referring to previous cases:—"The result of these cases in our opinion, is, that an alienation made by the managing member of a joint family cannot be binding upon his adult co-sharers unless it is shown that it was made with their consent, either express or implied. In cases of implied consent it is not necessary to prove its

existence with reference to a particular instance of alienation, but a general consent may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family estate by the other members of the family; and the latter in entrusting the management of the family affairs to the manager must be presumed to have delegated to him the power of pledging the family credit or estate, where it is impossible or extremely inconvenient for the purpose of an efficient management of the estate, to consult them and obtain their consent before pledging such credit or estate :" *Miller* v. *Ranganath*, I.L.R., 12 C., 389 399.

Accordingly it has been held that the compulsory sale of the joint family property mortgaged by the managers of a trading or money-lending business of the family for the purposes of that business during the minority of the other members, in execution of a decree obtained in a suit brought against the managers only, is binding on the other members who cannot impugn the sale solely on the ground of their not being made parties to the suit, when it appears from the proceedings that the whole property was sold and bargained for: *Daulat* v. *Mehr*, I.L.R., 15 C., 70; and *Sheo* v. *Saheb*, I.L.R., 20 C., 453. The managers were held to represent the whole family in the suit. I shall return to this subject when dealing with the topic, Judicial Proceedings.

Manager's liability to account.—All the adult members are entitled to take part in the management of the joint property, and if all are joint managers then no one is liable to be called upon to render an account. But such a state of things is very rare: the joint family is founded on the principle of subordination to the senior or capable member, in the absence of which the disruption of the family must follow; hence one member becomes the *kartá* or governor of the family, as is generally the case in practice, and as such he is in exclusive management of the joint family property, exercises control over the income and the expenditure, and is the custodian of the surplus if any; therefore the other members have the right to an account against him, especially when they were minors. The principle upon which the right to call for an account rests, is not that the manager is to be looked upon as an agent or a partner; but it is that when one of several joint owners receives all the profits, he is bound to account to his co-sharers for their shares of the profits, after making such deductions as he has the right to make. The demand for an account may be made even during

jointness by a member desirous to know the actual state of the family fund. *Obhoy* v. *Pearce*, 13 W.R., F.B., 75.

But the accounts must be taken upon the footing of what has been actually spent for family purposes, and not upon the footing of what should have been so, if the manager had been more prudent and less extravagant. But he is bound to make good what has been misappropriated or concealed by him.

In the recent case of *Bhowani Prasad* v. *Juggernath*, (13 W.N., 309) Justice Mukharji has upon a review of cases, explained in an elaborate and lucid judgment, the principles on which accounts have to be taken with a view to a partition of joint family properties, and on which settled accounts may be re-opened. As regards the first, his Lordship observes,—"the account which has to be taken of the entire family property in the hands of the different members is mainly an enquiry into the existing assets; the head of the family cannot in general be called upon to defend the propriety of the past transactions of the family." Having regard to the possition of the manager, the ordinary rule followed is, that members are entitled, not to accounts of past transactions, but to a division of the family property actually existing at the date of partition, except in cases of fraud, mistake, misappropriation and the like.

With respect to the second, the learned judge observes—"It is well settled that, although the court is always reluctant to re-open an account which has been settled with deliberation and with tolerable fairness, relief will be granted where fraud or mistake is established. In *Varnon* v. *Vadry*, Lord Hardwicke ruled that, when an account has been stated if *fraud* or *imposition* is established the *whole* shall be opened; but, if there are *mistakes* and *omissions*, the party objecting shall be allowed no more thon to surcharge and falsify. In other words, as Lord Hardwicke stated in *Pitt* v. *Chalmondeley*, the *onus probandi* is always on the party having the liberty to surcharge and falsify, "for the court takes it as a stated account and establishes it; but if any of the parties can show *omission* for which credit ought to be given, that is a *surcharge*, or, if anything is inserted that is a *wrong charge*, he is at liberty to show it, and that is *falsification*, but that must be by proof on his side." But "if the court is of opinion that errors of sufficient number and sufficient magnitude are shown; it is not necessary that the errors shown should amount to fraud; if they are sufficient in number and importance whether

they are errors caused by mistake or errors caused by fraud the court has a right to open the accounts."

Right to account.—It should, however, be observed that a member of a joint family cannot sue for a share of the profits of the joint family estate, as hehas no definite share until partition. He may sue for partition of such estate, and then is he entitled to an account. But if the head of the joint family does not account for the profits, the provisions of the Civil Procedure Code as to mesne profits are not applicable to a suit for partition where the plaintiff has no specific interest until decree. They may, however, be allowed on partition, if the member was entirely excluded from the enjoyment of the joint property, or if it was held by a member otherwise than as manager of a joint family, as when he claims it as his exclusive property. *Pirthi* v. *Jowahir*, 14 I.A., 37 = I.L.R., 14 C., 493; *Shankar* v. *Hardeo*, 16 I. A, 71 = I.L.R., 16 C., 397; *Bhivrav* v. *Sitaram*. I.L.R., 19 B., 532.

Manager's remuneration.—The managing coparcerner of a joint Hindu family is not entitled to any special remuneration, as the property which he manages is one, of which he is a joint co-owner, and therefore in order to look after his own undivided coparcenery interest in the joint property, he cannot but look after the whole of it, that is to say, the management of the whole is inseparable from that of his own interest, and does not require any additional time or trouble for which compensation in money may be claimed, while on the other hand he is amply compensated by the enjoyment of the power exercised and involved in the management as well as in the control over the expenditure of the income of the property. *Krishna* v. *Raja*, I.L.R., 18 M., 73,86.

Guardians and Wards Act VIII 1890.—No guardian can be appointed under the Guardians and Wards Act, of the property of a minor member of a joint family governed by the Mitákshárá, if he is not possessed of separate property: *Sham* v. *Mahanunda*, I.L.R., 19 C., 301; *Jhabbu* v. *Ganga*, 17 A., 529. Otherwise, the interference would have forced the disruption of the joint family against the will of the members there of. If the minor's interests are imperilled by corrupt or bad management or other cause, the same may be protected by a suit for partition: *Mahadev* v. *Lakshman* I.L.R., 19 B., 99. The undivided coparcenary interest is not property of which a guardian appointed by the Court, can take care. But a guardian may be appointed to take care of the *person* of such a minor. *Virrupakshappa* v. *Nil*, I.L.R., 19 B., 309.

In the recent case of *Gharib-ullah* v. *Khalak Singh*, (30 I.A., 165, 170) Sir Arthur Wilson observes—"It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitákshára family. And in their Lordship's opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all and that therefore a guardian, if appointed, would have nothing to do with the family property."

But if there be no adult male member in the family, and all the co-parceners are minors, then undoubtedly a guardian of their joint estate must be appointed until one of them attains majority, when the entire estate is to be handed over to him as the *Karta* of the joint family.

5. *Alienation.*

Alienation before birth of male issue.—A male issue becomes entitled by birth to property which is in actual existence at the time of his birth. He cannot lay any claim to property which had, before he was born or begotten, been validly alienated by the father who had no co-parcener at the time, or if he had with their consent: the alienation cannot be impeached by him: *Bhola* v. *Kartick*, I.L.R., 34 C., 372.

Affectionate gift.—The father of a joint family is competent to make a gift of a small portion of the property out of affection in favour of a male or female member of the family. But he cannot alienate any considerable portion by way of affectionate gift to the members of the family: *Kamakshi* v. *Chakrapany*, I.L.R., 30 M., 452.

Alienation of family property.—Although the female members of a joint family are entitled to certain rights in the family property, yet as their right is imperfect and they hold a subordinate and dependent position, the male members alone have the right of managing and dealing with the property. When, therefore, alienation of any property becomes necessary for a purpose affecting the whole family, the male members are competent to effect the same, and they must all join in the transaction, in order to be bound by it. But if some of them are minors, then those that are adults are competent to make the necessary transfer. We have already seen (p. 220) that the manager also may alone make an alienation with the

express or implied consent of the other adult members, such consent being implied in a case of urgent necessity when it would be impossible or extremely inconvenient to obtain express consent: I.L.R., 12 C., 389. The managers of a joint family trading or money-lending business are the accredited agents of the family, and authorized to pledge its credit for all proper and necessary purposes within the scope of the agency, (*Daulat* v. *Mehr*, I.L.R., 15 C., 70; *Sheo* v. *Saheb*, I.L.R., 20 C., 453) and to represent the family in suits brought on mortgages executed by them in that capacity. The father of the family has the power of alienating the whole property for the payment of his debts which the sons are held bound to pay: *Nanomi* v. *Modhun*, I.L.R., 13 C., 21.

Legal necessity.—The expression *legal necessity* is very often used, to signify the causes for which, or the circumstances under which, a single member of a joint family, or a like person, having a limited interest in property, is authorized to transfer it so as to pass to the transferee a right to the entire property. It comprises maintenance and support of the family, preservation of the family estate, management of the family business, if any, performance of necessary religious rites such as marriage and the like initiatory ceremonies, exequial rites and *Sraddha* ceremony,—and the payment of debts contracted for the above purposes.

Alienation of undivided co-parcenary interest of a member.—The members of a joint family governed by the Mitákshará hold the joint property as joint-tenants and not as tenants-in-common as in the Bengal school. The Mitákshará theory of the tenure of joint property by members of a joint family, is, that each co-parcener's right extends to the whole; whereas the Dáyabhága doctrine is, that each member's right extends only to the share to which he would be entitled on partition, and not to the whole. From these theoretical conceptions of the nature of joint right, important legal consequences are deduced by the two schools. According to the Mitákshará, one member cannot alienate his undivided interest in the family property, for he has no definite share in it; and when he dies his interest passes by survivorship, for he has no specific defined share such as might be claimed by the heirs of his separate property. But the Dáyabhága controverts these doctrines by setting up a different theory of co-ownership as stated above, and maintains as incidents of this theory, that a single co-sharer is competent to deal with his undivided share, and that such share

does not pass by survivorship, but devolves on the heirs succeeding to his separate property.

The law on the subject of a member's power of alienating his undivided interest, is different in Deccan and in this side of India.

In Bombay and Madras—the strict ante-alienation rule of the Mitákshará has been departed from, and it has been held that a co-parcener can for *valuable* consideration, sell, encumber, or, otherwise alienate his interest in undivided family property : *Vasudev* v. *Venkatesh*, 10 B.H.C.R., 139 ; *Virasvami* v. *Ayyasvami*, 1 M.H.C.R., 471 ; *Ranga* v. *Ganapa*, I.L.R., 15 B., 673.

In Bengal and North-Western Provinces—the ante-alienation doctrine of the Mitákshará is strictly followed so far as voluntary alination by a co-parcener, of his undivided interest, is concerned. The question was considered by a Full Bench of the Calcutta High Court in the case of *Sudaburt* v. *Foolbash*, 12 W.R., F.B., 1, and it was held that a member of a joint Hindu family governed by the Mitákshará Law, has no authority to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account and not for the benefit of the family. In the case of *Balgobind* v. *Narain*, the Privy Council have laid down that under the Mitákshará, as administered by the High Court of the North-Western Provinces and Bengal, an undivided share in ancestral estate, held by a member of a joint family in co-parcenary cannot be mortgaged by him on his own account without the consent of his co-parceners : I.L.R., 15 A., 339. So also in a case from Oudh, the Judicial Committee have held that a nephew was entitled to recover from a purchaser from his uncle the latter's undivided share after his death, which had been sold without the former's consent : *Madho* v. *Mehrban* I.L.R., 18 C., 157.

Equity in favor of alienee when alienation set aside.—When an alienation made by a member, of his undivided share, is set aside at the instance of another member, the court may order that the property should be thenceforth posessed in defined shares, and that the share of the transferrer should be subject to a lien for the return of the purchase-money. For, equity looks on that as done which ought to have been done, and as a co-parcener may make his share available for payment of his just dues by coming to a partition with his co-sharers, and as he ought to do it and fulfil his obligation, the court of equity declares it done : *Mohabeer* v. *Ramyad*, 20 W.R., 192. But such

a course would be precluded by the death of the transferrer and by the accrual of the right by survivorship before a judicial partation could be enforced in that way : I.L.R., 18 C., 157.

Involuntary sale in execution before death.—Upon the same principle of equity, is founded the doctrine settled by judicial decisions that the undivided co-parcenary interest of a member in the joint peoperty may be seized and sold in execution of a decree agaist him for his personal debts : *Deen Dyal* v. *Jugdeep-narain*, I.L.R., 3C., 198 = 4 I.A., 247 ; *Rai Balkisen* v. *Rai Sita*, I.L.R., 7 A., 731 ; *Bailur* v. *Lakshmana*, I.L.R., 4 M., 302. A Hindu is bound, not only legally and morally, but also religiously, to pay off the debts contracted by him ; he is also in a position to pay when he has an interest in joint family property, provided that interest be severed by partition from that of his co-parceners,—but not otherwise ; the severance again depends entirely on his will, for partition may take place by the desire of a single co-sharer : the debtor, therefore, ought to have come to a partition, and applied his share to the payment of his debts ; he cannot in equity and good conscience, be permitted to defraud his creditors by choosing to continue joint, and to enjoy the same : his undivided co-parcenary interest, therefore is allowed to be seized and sold in execution of a money-decree against him, and the purchaser acquires the right of standing in his shoes for the purpose of carrying out partition, and getting his share. But this can be done only during the debtor's lifetime, and the interest must be attached before his death otherwise the right by survivorship would operate and defeat the creditor's equity : *Surajbunsi Koer* v. *Sheo Persad Singh*, I.L.R., 5 C., 148 ; *Madho* v. *Mehrban*, I.L.R., 18 C., 157.

Rights of purchaser of undivided share.—The purchaser of the undivided co-parcenary interest of a member of joint family, at a voluntary alienation permitted in Bombay and Madras, must be taken to purchase an uncertain and fluctuating interest, with the right of converting it, by partition after the purchase, into definite separate property. I have already told you that the interest of a member is liable to variation, according as existing co-parceners die or new co-parceners are born, until it is adjusted by partition, and so the interest purchased is liable to diminution by changes in the family, should there be delay on the part of the purchaser in suing for partition : *Ranga* v. *Krishna*, I.L.R., 14 M., 408. But a compulsory and involuntary sale in execution of a deceased member's share attached before his death, is taken to operate as a partition, in so far as regards

the division of interest, and the purchaser is entitled to what the debtor would get if a partition were *then* made; though partition, in so far as it means division of possession, may be effected by a suit subsequently brought for the same: *Hardi Narain* v. *Ruder Perkash*, I.L.R., 10 C., 626.

Position of vendor co-parcener.—It should, however, be observed that the co-parcener does not become divested of his status as a member of the joint family, by the mere sale of his undivided co-parcenary interest for value; nor can the purchaser have the status of a member of the family, so as to become benefited by survivorship on the death of a member without leaving male issue. Hence it appears that although the vendee may be a loser by birth of a member before partition is carried out by him, still the vendor is to be benefited by the death of a co-parcener: *Gurlingapa* v. *Nandapa*, I.L.R., 21 B., 797. But these questions that arise by reason of the departure from the Mitákshará law, and introduction of innovations destructive of the joint family system, are beset with considerable difficulty, and do not appear to be settled yet: I.L.R., 25 M., 690; 23 A., 106.

Gift.—Although on grounds of equity, the strict ante-alienation doctrine of the Mitákshará has been departed from in Bombay and Madras, in favour of purchasers for value, whom equity regards with considerable affection, yet equity does not thus act in favour of volunteers. Accordingly, it has been held that a Hindu cannot make a valid gift of his interest in undivided property; such gift is void and cannot prevent survivors from taking the share: *Baba* v. *Timma*, I.L.R., 7 M., 357; *Ponnusami* v. *Thatha*, 9 M., 273; *Virayya* v. *Hanumanta*, I.L.R., 14 M., 459; *Lakshman* v. *Ram*, I.L.R., 5 B., 48, 61.

Devise of undivided interest.—A testamentary gift also, of the undivided interest stands on the same footing as a gift *inter vivos*. For, as regards testamentary power, it is now settled law that no Hindu governed by the Mitákshará can make a testamentary disposition of his undivided interest in the joint family property, which interest passes, on the moment of his death, by survivorship, to the surviving male members, so that there is nothing left on which his will can operate. The law on the subject has been explained by the Privy Council in the case of *Lakshman Dada Naik* v. *Ram Chandra Dada Naik*, thus,—

"It has been ingeniously argued that partial effect ought to be given to the Will, by treating it as a disposition of the one-third undivided share in the property to which the father

was entitled in his lifetime. The argument is founded upon the comparatively modern decisions of the Courts of Madras and Bombay, which have been recognised by this Committee as establishing, that one of several co-parceners has, to some extent, a power of disposing of his undivided share without the consent of his co-shares.

"Those cases have established that such a share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment-debtor, and that it may be also made the subject of an alienation by a deed executed for valuable consideration. The Madras High Court has gone further, and ruled that an alienation by a gift or other voluntary conveyance, *inter vivos*, will also be valid against the non-assentient co-parceners. And assuming this latter proposition to be law, the learned Counsel for the appellant have insisted, that it follows as a necessary consequence, that such a share may be disposed of by will, because the authorities which engrafted the testamentary power upon the Hindu law, have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by Will.

"To this argument there are two answers. There Lordships have to apply to this case the law as it is received at Bombay. The decisions of the High Court of Bombay have ruled that a co-parcener cannot, without the consent of his co-sharers, either give or devise his share; that the alienation of it must be for value; and if this be law, the whole argument in favour of testamentary power over the undivided share fails.

"Again, the High Court of Madras, though admitting that a co-parcener can effectually alienate his share by gift, has ruled that he cannot dispose of it by Will. Its reasons for making this distinction between a gift and a devise are, that the co-parcener's power of alienation is founded upon his right to a partition; that that right dies with him; and that the title of his co-sharers by survivorship, vesting in them at the moment of his death, there remains nothing upon which the Will can operate. This principle was invoked in the case of *Surajbunsi Koer*, and was fully recognised by their Lordships although they decided the particular case, which was one of an execution against a mortgaged share, on the ground that the proceedings had then gone so far in the lifetime of the mortgagor, as to give, notwithstanding his death a good title against his co-sharers to the execution purchasers. It follows from

what has been said, that the weight of positive authority at Madras, as well as at Bombay, is against the proposition of the learned Counsel for the appellant.

"Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers, beyond the decided cases. In the case of *Surajbunsi Koer*, above referred to, they observed:—'There can be little doubt that all such alienations. whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitákshará law); and the law, as established in Madras and Bombay, has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition.' The question, therefore, is not so much, whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence?" I.L.R., 5 B., 61 = 7 I.A., 181 : see also I.L.R., 22 C., 565, 571.

6. *Debts.*

Family debt.—When a debt is contracted for a family purpose by any member of the family, it is payable by the family or all the members. We have seen that the manager of a joint family or of its trading or money-lending business, is competent to charge or alienate the family property for a legal necessity falling within the scope of his authority.

Duty of creditor dealing with manager.—The lender dealing with a manager is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, that the manager is acting for the benefit of the family. If he does so enquire, and acts honestly, he is safe : he is not affected by the precedent mismanagement of the family property, nor by the subsequent non-application of the money to the purpose for which it is borrowed, nor even by the non-existence of the alleged necessity if it was reasonably credited and is legally sufficient : *Hunooman Persaud Panday* v. *Mt. Babooee Koer*, 6 M.I.A., 393. The Transfer of Property Act IV of 1882, Section 38, embodies the same rule by laying down that the circumstances constituting legal necessity shall be deemed to have existed, if the lender, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Personal debt of a Member.—According to the strict theory

of the Mitákshará law, the family property is not liable for the personal debts of a member. But a course of decisions has introduced two innovations destructive, to a great extent, of the Mitákshará system; one of which is the conversion into legal liability, of the son's pious duty to pay off the father's personal debts, and the consequent liability of the entire family property to satisfy the father's debts if not proved to have been contracted for immoral purposes; *Girdharee Lall* v. *Kantoo Lall*, 1 I.A., 321 = 22 W.R., 56 and the other is, the compulsory sale of a member's undivided co-parcenary interest in the family property in execution of a money decree against him: *Deendyal* v. *Jugdeep Narain*, 3 C., 198 = 4 I.A., 247.

But while our courts have gone far beyond Hindu Law to help the father's creditors, they do at the same time overlook and refuse to enforce the rule of Hindu Law in favour of the creditors of members other than the father.

For though a debtor's co-parcenary interest is allowed to be sold during his lifetime in execution of the creditor's decree, yet it has been held that if the debtor dies before the attachment of his undivided interest, the creditor cannot follow it into the hands of the collateral male members to whom it passes by survivorship and who are considered not liable for the debts.

Attachment has the effect of making the decretal debt a legal charge on the debtor's undivided interest. Accordingly, after the attachment of a son's interest in execution of a decree against him, the father cannot alienate that interest to pay off his own debts: *Subraya* v. *Nagappa*, I.L.R., 33 B., 264.

Liability of the heir by survivorship.—But the Hindu Law decalres the heir of a person, whether taking by survivorship or by succession, to be liable for his debts. The rules on the subject are contained in three slokas of Yájnavalkya (text No. 18, p. 184) and are explained in that part of the Mitákshará, where the Action for Recovery of Debts, is dealt with, and may be summarised as follows:—

1. That the male issue are liable to pay off the debts of their father and paternal grandfather, whether they inherit any property from or through them, or not. But the grandson is not liable to pay interest; and the great-grandson as such is not liable, though he is liable to pay the great-grandfather's debts when he inherits the latter's property.

2. That their liability arises only when the ancestor is dead or gone to a distant place and not heard of for twenty years, or laid up with an incurable disease.

3. That they are not liable for debts incurred for indulgence in women, wine, or wager, or for other unlawful purposes.

4. That he who takes the *riktha* (=rights) or heritage of a person, *i.e.*, his heir by survivorship or by succession, is bound to pay off his debts. The term *riktha* means heritage *obstructed* or *unobstructed*: that this word signifies *unobstructed* heritage or co-parcenary interest lapsing or devolving by survivorship on a callateral relation, is beyond all doubt: see Mitákshará 1,1, 13.

The Hindu law discloses a high sense of morality as regards the payment of debts, which is declared to be religiously necessary for the salvation of the debtor's soul.

Our courts are certainly right in so far as they do not allow creditors to follow the co-parcenary interest passing by survivorship to an heir other than the male issue. For Hindu law nowhere contemplates a compulsory sale of immoveable property in execution of decrees. The policy of Hindu legislators appear to have been rather against depriving people of ancestral land, the hereditary source of their maintenance. But when that policy has been departed from to an unwarrantable extent, in the case of the father's debts, to the prejudice and injury of the male descendants, there is no cogent reason why the remoter heirs should be exempted from a just liability and permitted to appropriate the deceased debtor's undivided interest free from the charge of paying his debts.

Father's debts and son's liability.—The pious duty of a son as such, to pay off his father's debts is independent of his inheriting any property from or through him: whereas the liability of an heir as such, must be limited by the extent of the inherited property. The son's pious duty again, arises only after the father's death, as a general rule.

It should be noticed that the debts of the male-ancestors in the male line stand on a different footing from those of collateral co-parceners of the same rank with them; accordingly a fraternal nephew is not bound to pay the debts of his paternal uncle, nor is his undivided co-parcenary interest liable to be attached and sold in execution of a personal decree against the uncle, though he is the head of the family: *Ram* v. *Lachman*, I.L.R., 30 A., 460.

We have already seen that as regards ancestral property there is no distinction between the father's and the son's interest, either in extent or in character.

Our courts of justice have transformed the future pious duty of sons to pay off the father's debts, into a present legal liability annexed to both the father's and the son's interests in the ancestral property, if the father's debts were not contracted for illegal or immoral purposes. The son has been made liable for the father's debts whether he be alive or dead : *Govind.* v. *Sakharam,* I.L.R., 28 B, 383. And accordingly it is held that an alienation by sale, mortgage or the like, of the family property by the father of the family, for his *antecedent* lawful debts, is valid and binding on the sons : *Girdharee* v. *Kantoo,* 1 I.A., 321 = 22 W.R., 56. The same principle is applied also to a sale in execution of a decree against the father, at which ancestral property was sold to a *bona fide* purchaser for value : *Muddun* v. *Kantoo,* 1 I.A., 333.

Referring to this case, the Judicial Committee made the following observations in *Suraj Bunsi Koer's* case,—

"This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions :—

"1st—that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an *antecedent* debt, or in order to raise money to pay off an *antecedent* debt, or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted ; and 2ndly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings" :—6 I.A., 88, 106 = 5 C., 148, 171.

In the case of *Nanomi Babuasin,* 13 I.A., 1 = I.L.R., 13 C., 21, their Lordships observe,—"Destructive as it may be of the principle of the independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights againts their father's alienation for an *antecedent* debt, or against his creditor's remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority".

Some nice questions then arose as to the validity or otherwise of a mortgage or the like alienation, made by the father when there was no *antecedent* debt ; but it was contended that

having regard to the principle enunciated in *Girdharee's* case, the consideration money paid to the father for such alienation, if not proved to be taken or spent for immoral purposes, must itself constitute a lawful debt payable by sons; and accordingly it has been held that although the mortgagee is not entitled to mortgage decree yet the debt being *antecedent* to the suit on the mortgage, he is entitled to a money decree directing the debt to be realised out of the whole ancestral estate inclusive of the mortgaged property: *Luchmun* v. *Giridhur*, I.L.R., 5 C., 855; *Gunga* v. *Ajudhia*, I.L.R., 8 C., 131; *Khalilul* v. *Gobind*, I.L.R., 20 C., 328.

The conclusion deducible from the somewhat conflicting cases appears to be, that in the absence of *antecedent debt* or *legal necessity* a mortgage by a father cannot be binding on his sons, though they may be liable for the debt if not proved to be immoral or illegal: *Chandra* v. *Mata*, I.L.R., 31 A., 176.

An *antecedent debt* means, with regard to a mortgage, debt *antecedent* to the transaction, and in the case of a proceeding by suit, debt antecedent to the institution of the suit: I.L.R., 20 C., 328, 346.

It may be asked why should there be any distinction between an *antecedent* debt and a *present* debt, with respect to the validity of a mortgage executed by the father to secure the same, and as to its binding character on the non-executant sons, if the debt is not tainted with immorality? The distinction appears to be logically inconsistent, and accordingly it appears to be held by some judges that a mortgage by a father for his *present* debt is binding on his sons: *Debi* v. *Jadu*, I.L.R., 24 A., 459; *Chidambara* v *Koothaperumal*, I.L.R., 27 M., 326.

But a different answer to the above question should be given according to the principle enunciated by the Lords of the Judicial Committee in the following passage,—"The question, therefore, is not so much, whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence". 7 I.A., 181. It seems, therefore, that as the doctrine of son's liability for father's debt is of the same character, the distinction cannot be disregarded but should be accepted, though it might appear illogical.

There is however a conflict of decisions on this point in the Calcutta High Court. The argument that the distinction between the *antecedent* and the *present* debts as laid down in the Full Bench case of *Luchman Dass* v. *Giridhur Chowdhry*,

(5 C., 855,) has virtually been abolished by the Judicial Committee by their decisions in recent cases—though not accepted by the learned judges deciding the case of *Surja prosad* v. *Golab chand*, (27 C., 762)—has been held to be correct in the recent case of *Moheswar Dutt* v. *Kishun Singh*, (34 C., 184), which has, however, been dissented from in the still more recent case of *Kishna persad* v. *Tipan persad*, (34 C., 735,) in which the law as laid down by the Full Bench is held to be still in force.

The father's creditor, therefore, is entitled to realize his debts not only from the father's undivided co-parcenary interest in the ancestral property during his life, but also from the entire property inclusive of his and the son's interests, either during his life or after his death. Thus the creditor has the right to proceed either against the father's interest or against the entire property during his life; and it is a question of fact to be decided by having reference to the circumstances of each case, as to whether the father's interest only or the entire property was sold in execution of a money decree against the father alone. This question will be discussed in the next topic.

When a joint family consists of a father and his son, and also of collateral co-parceners, then the interests of both the father and the son in the family property are liable for the father's lawful debts, and the execution-purchaser would be entitled to have their shares allotted to him at a partition with the collateral co-parceners: *Ghanammal* v. *Muthusami*, I.L.R., 13 M., 47.

The strict rule of the Shástras, that a son is liable to pay his father's debts with interest; and a grandson, those of his grandfather without interest, even though no assets have been inherited, was *legally* enforced in Bombay, until the liability was limited to assets by legislation: Bombay Act VII of 1866.

It would seem that partition is the only remedy by which a son may now protect his interests from the liability of paying off the debts of an extravagant father; but this would apply only to debts incurred after the partition.

What debts, male issue not liable to pay.—It is worthy of special notice that the question as to the liability of the male issue for the debts of the father or other paternal male ancestor, is dealt with by the Judicial Committee as part of the Joint Family Law, and with respect to what may properly be called *debt* or money borrowed. It is not reasonable to suppose that the whole Chapter of the Hindu law on the topic

or *from of action* called Recovery of Debts is intended by their Lordships to have the force of law now.

The different Civil Courts Acts do not include *Recovery of Debts* while enumerating the branches of Hindu law to be administered by the civil courts of the different provinces respectively. The Bombay Civil Courts Act, however, does not at all refer to the Hindu and the Mahomedan laws, but provides that the law to be observed in the trial of suits shall be *statutory law*; in the absence of such law, *local usage*; if none such appears, the *law* of the *defendant*; and in their absence, *equity, justice,* and *good conscience.* The language of the Bombay Act is elastic, and any branch of Hindu law may be enforced, either as the law of the defendent, or as furnishing a rule consistent with the priciples of *equity* and *justice.*

Father's debts not payable by sons as enumerated by Yájnavalkya, Ushanas cited in Mit. on ii, 47, and Vrihaspati, Gautama and Vyasa cited in Viváda-Ratnákara *pp.* 57-58, are as follows —(1) debts due for *spirituous liquor,* (2) for *lust,* or (3) for *gambling,* (4) unpaid *fines,* (5) unpaid *tolls,* (6) *useless gifts* or promises without consideration or made under the influence of lust or wrath, (7) debt for being *surety,* (8) debt by or for *trade* and (9) debt that is not *vhyavahárika* or lawful, usual or customary.

The Mitákshára on the text of Yájnavalkya, explains "*useless gifts*" to be gifts promised to an impostor, wrestler, flatterer, or the like.

With respect to liability for *suretyship* there is a difference between the sages; according to some, the son is liable, if the father was surety for repayment of money, not in other cases; according to others, the son is not liable in any case. This is not however, a debt for which the other members of the family should be made liable. But the other High Courts have dealt with this question, as if the whole Chapter on Recovery of Debts is now in force: I.L.R., 11 M., 373; 23 B., 454; 26 A., 611 and 28 B., 408. In the last case a grandson was exonerated from liability for grandfather's suretyship without a consideration.

As regards the term *vyavahárika,* Pandit Giris Chandra Tarkálankára the learned translator of the whole of the Vyavahárádhyáya or Litigation Book of the Mitákshará, has rendered it into "*necessary for life.*" In a recent decision of the Bombay High Court, the original term "*not vyavahárika*" is supposed to be *avyavahára,* "which," it is observed

by the learned judges, "may perhaps be better rendered as *unusual*, or *not sanctioned by law or custom.* It is this word that has crept into our text books under the guise, or disguise, of *illegal* or *immoral*: and it will be seen that it really bears a wider significance. Put to simple English, the texts amount to this: that the son is not to be held liable for debts which the father ought not as a decent and respectable man to have incurred. He is answerable for the debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices." Accordingly it is held by their Lordships that a son is not liable under a decree obtained against the father for damages caused by the father's *wrongful*, though not illegal, act in erecting a dam obstructing passage of water to the plaintiff's property; the son could not be held answerable for the liability incurred by the father, from which the family estate derived no benefit: *Durbar* v. *Khachar*, I.L.R., 32 B., 348.

The learned judges do not seem to be right in thinking that this word has crept into text-books as *illegal* or *immoral* whereas the writers of the text-books use the two terms as comprising all the debts for which the sons are declared not liable.

The Madras High Court does, however, draw a distinction between a breach of civil duty and a criminal act, with respect to misappropriation of money by the father for purpose of determining the liability of sons to make good the loss caused thereby, who are held to be liable if the taking itself does not amount to a criminal act, in which case a son cannot be made liable: *McDowell* v *Ragava*, I.L.R., 27 M., 71; *Kanemar* v. *Krishna*, 31 M., 161; *Erasala* v. *Addepally* 31 M., 472.

This view is somewhat inconsistent with that taken by the learned judges in the Bombay case, according to which sons should be held not liable in any case of misappropriation by the father.

The Calcutta High Court has held that damages for wrongful misappropriation by a father of another person's property cannot be deemed *debts* for which a son may be liable; there was no debt antecedent to the decree, but merely a right for damages for a wrongful and criminal act: *Pareman* v. *Bhattu* I.L.R., 24 C., 672.

It should be noticed that if a father embarks in a new trading business, his sons cannot be made liable for the debts incurred by him for the same. The case would be different if the business was an ancestral trade.

While explaining the text of Yájnavalkya, the Mitákshará says,—"that sons are not bound to pay to the *wineseller* and the rest"—*i. e.*, to the *winning gambler*, to the *mistress*, and the others.

This explanation shows that there should be direct connection between the debt and the immorality exonerating the male issue from the liability of paying the same. The mere proof or general evidence that the father was grossly extravagant and selfish in expenditure (*Sita* v. *Zalim*, I.L.R., 8 A., 231) or a man of extravagant and immoral habits and kept a mistress and delighted in nautches (*Chinta* v. *Kashi*, 14 B., 320), or that he attended *nautches* or also gave *nautches* at his own expense, (*Budree* v. *Kantee*, 23 W.R., 260), was not enough, unless some connection be shown between the debts and the father's immoralities.

But the conclusion deducible from a consideration of the decisions of the Judicial Committee appears to be that when a father who is the head of a joint family consisting of himself and his male issue contracts debts, a *prima facie* presumption is raised against his sons that the same were for the benefit of the family, even when the creditor fails to prove the existence of any legal necessity for the same, —which can be rebutted only if the sons can show that the debts were such as could not under the Hindu law, be binding on them by reason of immorality or illegality. But the sons cannot be held liable when there was no *debt* contracted, but a pecuniary liability arises from the father's suretyship, or from his wrongful acts, for which damages may be awarded, but by which the family has not been benefited at all. It should however, be borne in mind that the rule introduced by the Privy Council is not a rule of Hindu law, but a new one founded on principles of equity and justice, and supported by the son's pious liability to pay the father's lawful debts presumably contracted for the benefit of the family.

Indian Legislature and Judical Committee.—A student of jurisprudence would be at a loss to understand the principle on which the highest tribunals are changing the Mitákshará Law which they are called on to administer. Hindu law as it is, seems to be suited to the exigencies, and is conducive to the welfare and well-being, of Hindu society; and the introduction of an innovation, like the legal liability of the son to pay off the father's debt, has been attended with mischievous consequences entailing great hardship. The Indian money-

lenders are shrewd and astute enough to be able to protect their own interests, while men of property here are often surrounded by unprincipled servants and hangers-on who feel no compunction in robbing their masters and benefactors in collusion with money-lenders not found to be endowed with honesty. By the operation of the doctrine introduced by the Privy Council in *Girdharee Lall's* case many ancient families are becoming ruined and reduced to poverty. But while the Judicial Committee is changing the law for the benefit of dishonest money-lenders mistaken for honest bankers, the Indian Legislature is passing Enactment after Enactment for the protection of the people against the money-lenders.

7. *Judicial Proceedings.*

Personal and representative capacity.—Every member of a joint family has two capacities, one of which may be called the personal, and the other, the representative. In transactions with outsiders he represents the whole family, if the acts in his representative capacity; but if they relate to his individual interests, then he acts in his personal capacity. In all transactions and concerns with the outside world a single member such as the manager, acts as the representative of the family so as to bind the whole family, when those are for the benefit or necessity of the family : a member other than the manager can so act if he is previously authorized or his acts be subsequently ratified by words or conduct ; *Vithu* v. *Babaji*, I.L.R., 32 B., 375. A property purchased in the name of a member of a joint family is presumed to be family property, on the principle that he represents the family. When transactions are made in the name of one member, as for instance when a bond stands in a single member's name, that member represents the family in relation to the other party, as regards matters arising out of the transaction, and accordingly the single member is *prima facie* entitled to collect the bond debt, and payment to him would operate as a valid discharge of the debt; 9 M.L.J., 103 and 155. How far a single member may represent the family in suits or other judicial proceedings is now considered.

The ordinary general rule is that no person can be bound by a decree to which he is not a party, it cannot even be used as evidence against him ; and that a person cannot be appointed guardian *ad litem*, if his interests be adverse to those of the minor. Hence all the members must be parties to a suit relating

to the property, trade or business of the family. But this rule is not followed in all cases in which the managing member alone was the party to a suit; sometimes he is held to represent the whole family, and sometimes not so. The decisions do not seem to be uniform. *Mt. Phoolbas* v. *Lalla*, 3 I A., 7, 26; *Nathuni* v. *Manraj*, I.L.R, 2 C., 149; *Ramsebuk* v. *Ramlal*, 6 C., 815.

Suit by the manager or a single member.—There are several cases in which it has been held that one member of a joint family, cannot alone sue on behalf of the family: *Seshan* v. *Veera* I.L.R., 32 M., 284. Even the managing members carrying on a joint family business are held to be not entitled to maintain a suit against debtors in their own names without joining all the co-perceners: *Shamrathi* v. *Kishen*, I.L.R., 29 A., 311. When, however, the other members of the family are minors, then, the manager who is the *de facto* guardian of their interests must necessarily represent the whole family, and may alone sue, but the defendant may always insist on all the co-owners being joined as plaintiffs on the record. *Harigopal* v *Gokaldas*, I.LR., 12 B., 158; I.L.R., 10 B., 32; *Jas* v. *Sher*, 25 A., 162. Even when the other members are adults, it has been held that the question of the right of the manager to sue in his own name is rather one of authority; and the defendant desirous of bringing in the other members on the record for insuring himself against further litigation should take the objection at an early stage, as the same is capable of being waived: *Guruvayya* v. *Dattaraya*, I.L.R., 28 B., 11, 19 So it has been held that the dismissal of a previous suit brought by elder brothers is not binding on a minor brother in the absence of evidence proving that they acted on behalf of the family, or that any one of them had been a *de facto* manager of the family; I.L.R., 10 B, 21.

When a mortgage stands in the name of a single member, he alone may sue upon it without joining the other members of the family: 9 M.L.J., 103.

Suit against manager alone.—It has been held that a decree in a suit against one brother alone, based on a mortgage executed by him as manager for legal necessity even during the minority of another brother, and the sale of the mortgaged property in execution of that decree, are not binding on the other brother: I.L.R., 11 C., 293; I.L.R., 5 M., 125.

The learned judges in these cases enunciate the ordinary principle that a person ought not to be deprived of his rights

by judicial proceedings to which he was no party. But if the debt was one payable by that person as well as by the parties to the previous suit, and the property was sold at its proper price, and there is no other ground for impugning the decree or the sale, so far as his share is concerned, save and except the mere technical objection of his not having been made a party to the previous proceedings, then it has been held in some cases, having regard to the peculiar nature of the transaction and position of the members who alone had been made defendants in the previous suit, that all the members were bound by the proceedings although some were not joined on the record. Thus the managers of a joint family trade and of its money-lending business have been held to be the accredited agents of the family and to represent the whole family, in transactions falling within the scope of their authority such as borrowing money by pledging the family property, for the purposes of such trade or business, as well as in suits based on such mortgage, brought against them only; and the whole family property has been held to pass to the execution-purchaser, unless it can be proved by the other members who were not parties to the suit, that there was no legal necessity or that what was intended to be sold and bargained for, was not the whole family property, but only the co-parcenary interest of the managers who alone were parties to the previous suit; *Daulat Ram* v. *Mehr Chand*, I.L.R., 15 C., 70 = 14 I.A., 187; *Sheo Pershad* v. *Saheb Lal*, I.L.R., 20 C., 453; *Baldeo* v. *Mobarak*, 29 C., 583. So also it has been held that the member of the family in whose name a lease-hold property stood represented the family in suits respecting the rent of the property, and that the decrees for rent against him alone may be realized by the sale of the whole family property: *Bissesur Lall* v. *Luchmessur*, 5 C.L.R., 477 = 6 I.A., 233; *Hari* v. *Jairam*, I.L.R., 14 B., 597.

Having regard to the low standard of morality among the money-lenders and many other classes of people in this country, this departure from the strict rule of law appears to be likely to lead to fraud, collusion and dishonesty for the purpose of depriving men of their just rights by law-suits of which they may be ignorant; and our courts would not be justified in extending this exceptional rule.

Suit against father.—The father of the family stands on a different footing from that of a brother or an uncle, and cannot be presumed to act in fraud of his sons, and therefore he

may, in a judicial proceeding, be deemed to represent the family consisting of himself and his male issue.

The following extract from the judgment of the Privy Council in the case of *Mt. Nanomi Babuasin* v. *Modun Mohun* (I.L.R., 13 C., 21 = 13 I.A., 1) shows what the law is on the subject :—

"There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitákshará law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on the subject are on all points in harmony, either in India or here.*** ·

"It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an *antecedent* debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.

"The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deendyal's* case bound the Court to hold that nothing but Girdhari's (the father's) co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is, that not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it

will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest alone (and in *Deendyal's* case there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings."

What passes in execution against father alone.—In this case and in the cases of *Bhagbut* v. *Mt. Girja*, I.L R., 15 C., 717= 15 I.A., 99, *Minakshi* v. *Immudi Kanaka*, I.L R, 12 M., 142= 16 I.A., 1, and *Mahabir* v. *Moheswar*, I.L R, 17 C., 584= 17 I.A., 11, the Judicial Committe held that the entire family property passed in execution of a decree against the father alone; and in the cases of *Deendyal* v. *Jugdeep*, I.L.R., 3 C, 198=4 I.A., 247, *Suraj Bunsi* v. *Sheo Persad*, I L R., 5 C., 148=6 I A., 88, *Hardi* v. *Ruder*, I.L R., 10 C., 626=11 I A., 26, *Simbhunath* v. *Golap Sing*, I.L.R., 14 C., 572=14 I.A., 77, and *Pettachi* v *Sangili*, I.L R, 10 M, 241=14 I.A., 84, it was held that the father's undivided interest only passed. The following propositions appear to be laid down in these cases:—

1. The whole family property may be sold in execution of a money decree against the father alone, if the debt was not contracted for immoral or illegal purposes.

2. If the proceedings show that the intention was to sell the entire property and the same was sold and bargained for, then the purchaser would be entitled to the whole; and the sons though not parties to the proceedings, cannot claim their shares against the purchaser except by proving that the debt was contracted for immoral or illegal purposes, and that the purchaser had actual or constructive notice of that fact. A claim preferred by the sons has been held to affect the purchaser with such notice: I.L.R., 5 C., 148. When the execution-creditor is the purchaser, he is affected with full notice of all the proceedings: 14 I.A., 84.

3. Should, however, the original transaction and the proceedings in the suit, as well as the price paid, show that what was intended to be sold was the father's co-parcenary interest only, then the purchaser cannot get more than that interest: I.L.R., 14 C., 572. In the absence of circumstances showing an

intention to put up the entire interest of the family in the property sold in execution of a money-decree against the father, only his interest passes to the execution-purchaser : *Maruti* v. *Babaji*, I.L.R., 15 B., 87.

4. The Court will look at the substance, and not merely at the form, of the execution-proceedings, and therefore the expression "right, title and interest of the judgment-debtor" used in the sale-proceedings and in the sale-certificate, is not to be taken to necessarily show that the father's interest only was sold : (*Jugul* v. *M. R. Jatindra*, 11 I.A., 66 = I.L.R., 10 C., 985, 992).

5. The points to be determined in such cases are,—

(*a*) What was the interest that was bargained for and paid for by the purchaser ? Was it the father's interest only, or was it the interest of the entire family ? And if the latter, then

(*b*) Were the debts, for which the decree was obtained, in execution of which the property was sold, contracted for immoral or illegal purposes ? and

(*c*) Had the purchaser notice that the debts were so contracted ? *Krishnáji* v. *Vithal*, I.L.R., 12 B., 625.

Transfer of Property Act § 85.—There is, however, no strong reason why our courts should be so indulgent to money-lenders who are found as a general rule to be unscrupulous and dishonest, as to depart from the ordinary law, and hold that members of a joint family are bound by alienations and decrees and execution-sales to which they were not parties, except in the exceptional case of the father of a family being the transferor or the judgment-debtor. In a case in which the sons objected to the sale of their interests in execution of a decree obtained against the father alone, in a suit on mortgage executed by him, upon the ground of their not having been made parties to the mortgage-suit, the Allahabad High Court has held,—that Section 85 of the Transfer of Property Act is imperative and applies to a suit on mortgage executed only by the father or any other manager of a joint family : *Bhawani* v. *Kallu*, I.L.R., 17 A., 537. The Calcutta High Court also has in a similar case held that that Section is compulsory, and that the minor son was not represented by the father who was the mortgagor, and against whom alone the suit on the mortgage had been brought and decree obtained. But their Lordships held that inasmuch as the minor sued to declare that he was not bound by the decree nor by the mortgage, the debt having been contracted

for illegal and immoral purposes, and as the latter point was found against him, and he was not willing to redeem, his suit must be dismissed though he was not a party to the decree since the only right the minor plaintiff now had was the right to redeem; *Lala* v. *Golab*, I.L.R., 28 C., 517. This view has been adopted by the Allahabad High Court: I.L.R., 24 A., 211.

It should, however, be observed that this view of Section 85 of the Transfer of Property Act, namely, that according to its provisions even the father cannot be held to represent his male issue in a mortgage-suit brought against him alone, and in the subsequent proceedings including sale of the family property in execution,—is in direct conflict with the law laid down and explained by the Judicial Committee in the cases of *Girdharee Lall* (1 I.A., 321) *Muddun Thakoor* (1 I.A., 333) *Suraj Bunsi Koer* (6 I.A., 88) and *Namomi Babuasin* (13 I. A., 1) and in several others. The question is not merely one of Procedure but one intimately connected with the Substantive Law of Joint Families, the corporate constitution of which necessitates their representation by a single member in transactions with outsiders. It is no doubt true that the ordinary rule, that all persons should be made parties to suits that affect their interests in property, ought to be applied even when the members of a joint family are concerned, for safe-guarding their interests against the possible fraud and collusion of the managing members, and for preventing the property from being sold at an inadequate price by reason of all the interested members not being made parties to the proceedings, and by reason of the purchaser's apprehension of subsequent litigation. The doctrine of representation, therefore, should not be extended to judicial proceedings as a general rule. But when the managing member is the father of the family there is a strong, if not conclusive, presumption against fraud and collusion, there being sufficient safe-guard of the interests of the other members in his natural affection and love for them.

Section 85 does not lay down any *new* rule, but it simply embodies what had been well understood to be the law on the subject, before that Act was passed: the only difference being that the proviso of that section is misleading, as if the plaintiff's ignorance of the interests of other persons in the mortgaged property, would relieve him from the consequences of his omission to make them parties.

The question is whether the exception to that general rule,

laid down by the Judicial Committee on the basis of the doctrine of representation, has been repealed by the Legislature.

It is worthy of special remark that the Privy Council have enunciated two propositions, namely, (1) that the father may alienate the whole property for paying off his antecedent lawful debts, and (2) that the Courts can do what the debtor himself could do, that is, effect a judicial sale of the whole property in execution of a decree against the father alone for his lawful debts. It would be anomalous if a purchaser under a judicial sale be in a worse position than a private purchaser. The Allahabad High Court has therefore, having regard to the Full Bench ruling in *Bhowani Prosad's* case, drawn a distinction between a case in which the sons raise the objection by suit before execution sale, and one in which they allow the sale to take place and afterwards bring a suit to have a declaration that their interests are unaffected by the sale, upon the ground of their not having been impleaded in the mortgage suit under Section 85 of the Transfer of Property Act, and held that they cannot succeed in the latter case unless they prove that the debt was merely illusory and fititious or that it was incurred for immoral or illegal purposes: *Debi* v. *Jai*, I.L,R, 25, A., 214.

There is a difference of opinion among the learned judges as to the effect of the said Section 85, which seems to be caused by the different stand-points of view from which the question is considered. Looking from a theoretical point of view, it appears to be unjust that a person having an interest in the property should lose it without having an opportunity to redeem the mortgage by being impleaded in the suit brought upon it; while it strikes one who considers the question from a practical point of view, where is the fund to come from? with which the son would redeem the mortgage; for, if the joint family had had funds, the father would have redeemed it, and would never have allowed the property to be sold in execution. Such suits are brought not with the intention to redeem, but to get back, if possible, a portion of the propety by means of this technical objection. Hence it seems that Justices Chandra Madhab Ghosh (27 C., 724, 730)and Pramada Charan Banerji (17 A., 537, 539) who are perfectly familier with the inner condition of joint Hindu families, and who look upon the question from the practical point of view, held, differing from their learned European colleagues, that even when the objection was raised by the sons before the sale, they cannot succeed merely on the ground that they were not made parties

to the judicial proceedings, as they must be deemed to have been represented by their father.

Father's death, after decree against him alone.—There was formerly a difference of opinion between the Bombay (*Umed* v. *Goman*, I.L.R., 20 B., 385) and the Calcutta (*Juga* v. *Audh*, 6 W. N, 223) High Courts, with respect to the question whether a decree against the father alone can be executed against the sons after the father's death, the former holding that it could be, while the latter held that a separate suit must be brought. But in a recent case the Calcutta High Court adopted the Bombay view with respect to a mortgage decree (*Chander* v. *Sham*, 33 C , 676). This conflict of decisions resulted in a reference of the question for decision by a Full Bench, by whom it has been held that a money-decree or a mortgage-decree passed against the father alone, may, after his death, be executed against his sons as his legal representatives who are, however, entitled to raise under Section 244 (now 47) of the Civil Procedure Code, the question as to lawfulness of the debt : *Amarchand* v. *Sebakchand*, I.L.R., 34 C., 642, F. B.

The effect of the decisions of the Judicial Committee. however, seems to be that the entire family property is to be deemed as the father's assets for the payment of his debts, in the hands of his male issue as his legal representatives.

The law on this subject is now settled by the new Civil Procedure Code, Act No V of 1908, Sections 50, 52 and 53, in which the view taken by the said Full Bench has been embodied.

Compromise & Family arrangement by father.—A consent decree based on a compromise evidencing a family arrangement settling disputed claims set up in a previous suit instituted by the father alone, is held to be binding on the sons in a subsequent suit by them, when no ground is established for setting it aside, nor is it shown to be unfair to them, not on the ground of operating as *res judicata*, but of other well-established principles of estoppel. Justice Mitra while dismissing the suit of the sons observed as fallows,—"The constitution of a joint Hindu family consisting of father and his sons is such that the father represents the sons.***He may sue and be sued and may bind the family by the result of the litigation. In a family arrangement settling disputed rights and liabilities, his action as representative of the family is binding on the dependent members. If the compromise of doubtful claims was *bona fide* entered into, the principle laid down in *Stapilton* v. *Stapilton*, (1 W.&T., 223,) and often followed in India (*Ram*

Nirunjun Singh v. *Prayag Singh*, I.L.R., 8 C., 138, and *Rameshwar Prosad* v. *Lachmi Prosad*, 31 C., 111.) would apply, as if the sons who were represented by the father were parties to the transaction. *Pitam Singh* v. *Ujagar Singh*, 1 A., 651 and *Ujagar Singh* v. *Pitam Singh*, 8 I.A., 190 = 4 A., 120, may be cited as affirming the rule applicable to the present case."—*Rai* v. *Rai*, 12 W N., 687, 694.

8. *Devolution of deceased member's interest.*

Accession, not succession, on member's death.—It has already been remarked that on the death of a member of a Mitákshará joint family his interest in its property lapses, the maintenance of his widow and maiden daughter and the latter's marriage expenses being charged on the family property by virtue of their own rights therein. But in loose language, often used even by lawyers, a deceased member's undivided co-parcenery interest is said to *pass* on his death by *survivorship*. There is not, however, *passing* or *succession* of the interest from the deceased member to the *survivors*; but, there is only *accession* to the latter's interests. The joint family estate is in its entirety vested in each co-parcener from the time of the commencement of his or her membership of the family, and title to its property: hence, no new right can accrue on the death of a member, which has the effect of extinguishing his connection with the family, as well as his title to its property, and thereby causing an *accession* to the interests of the survivors, but not necessarily for the benefit of all; for, when the family consists of different branches, then on the death of a member of one branch, the ultimate effect of the *accession* to the interests of the survivors, is, that only the members of that branch, become entitled to the benefit of survivorship., to the exclusion of the members of other branches, when partition takes place.

Accordingly it has been held that Act XIX of 1841 passed for the protection of deceased person's property against wrongful possession in cases of *succession*, cannot apply on the death of a member of a joint family, to his undivided co-parcenary interest in the family property, to which *succession* is inapplicable, which, therefore, is not within the scope of the Act: *Sato Koer* v. *Gopal*, I.L.R., 34 C., 929 = 12 W.N., 65.

Joint-tenancy and Survivorship.—The members of a joint family governed by the Mitákshará law, may be said to hold the family estate as joint-tenants. It has already been said that they

do not resemble, in every respect, the joint-tenants of English law, whose rights are equal in all respects, and whose joint-tenancy is accordingly said to be distinguished by unity of *possession*, unity of *interest*, unity of *title*, and unity of *time* of the commencement of such title; and all the survivors amongst whom, are equally entitled to the estate on the death of a joint-tenant, and whose joint-tenancy is created by a deed or a will.

The joint-tenancy under the Mitákshará arises by the operation of the law of inheritance. There is *unity* of possession and also, in one sense, unity of *title*, namely, the right derived immediately or mediately from a common ancestor: but there is neither unity of *time* of the commencement of title, nor unity of *interest* in all cases. It has been held by the Judicial Committee that two joint brothers succeeding to their mother's father's estate after her death take the same as joint-tenants with the benefit of survivorship: I.L.R., 25, M., 678, *ante* p. 189. Whether their male issue become their co-parceners or joint-tenants of the property so inherited by them, by reason of the same being held *ancestral* property—is a question on which there has been a conflict of decisions: it is answered in the affirmative by the Madras High Court; but in the negative, by the Allahabad High Court. In the formar case the question arose in a suit for partition between father and son; in the latter, between a son and the purchaser from the father who inherited the property from his maternal grandfather: 27 M., 382 and 29 A., 667. It should be observed that the survivorship here is not the same as in English law, but subject to the paramount right of a joint-tenant's male issue who are regarded as consubstantial of their father. It should be borne in mind that the principle of joint-tenancy is unknown to Hindu law, except in the case of co-parcenary between the members of an undivided family: *Jogeswar* v. *Ram*, 23 I.A., 37,44.

But it appears that under the Mitákshára school two joint co-parceners jointly succeeding to the *obstructed* heritage left by any other relation such as their mother or uncle, do not take the same as joint-tenants, but they take as tenants-in-common: 27 M., 300. That is so in all cases of joint inheritance according to the Bengal school.

And it appears to be the law in both the schools that co-tenants of joint acquisitions by *purchase*, take as tenants-in-common. Accordingly, when a gift of property is made to two persons jointly by a will or a deed, they take as tenants-in-common and not as joint-tenants: *Rewan* v. *Mussamut Radha*, 4 M.I.A.,

137, 173. In the recent case of *Jogeshwar Narain Deo* (cited above) the Privy Council appears to take the same view, as laid down in this case though it was not cited.

According to the English law of joint tenancy "a conveyance, or an agreement to convey his or her personal interest by one of the joint-tenants, operates as a severance." *Jogeswar* v. *Ram*, I.L.R., 23 C., 670, 679.

It has already been said that all the survivors are not entitled to the undivided interest of a deceased member in all cases: there is a certain order in which some of the joint-tenants take, to the exclusion of the rest; though it is ordinarily said that the interest of a deceased member passes by survivorship to the surviving male members alone; but this is true only in a qualified sense, so long as the family continues joint, and there is community of interest.

Order in devolution by survivorship.—The undivided co-parcenary interest really lapses, but having regard to the benefit derived by the survivors at partition, the undivided interest may be deemed to pass in a certain order: it devolves on the male issue in the first instance; on their default, it goes to the nearest male ascendant and the collaterals descended from him; and on failure of these, to the next male ascendant and his descendants; and so on. This is true in a qualified sense only; for, females getting shares on partition, do take the benefit of survivorship together with the males, provided partition takes place, when their shares also are augmented.

Suppose for instance, A and B are two brothers, having sons and ancestral property, then all of them are entitled to undivided interests in the property; but the death of a member of A's branch will not at partition augment the share of B and his branch. Suppose again that A dies leaving a wife and three sons, then A's share may be said to devolve on the widow and the sons, should the latter make a partition: if one of these sons dies before partition without leaving male issue, then his share may be said to devolve on his two surviving brothers and also on his mother, should the two brothers come to a partition during her life, otherwise on the two brothers only if they continue joint. It should however be borne in mind that what is *co-parcenary interest* during the joint state becomes converted into and is called *share* only on and after partition, and also in contemplation of it. But so long as the family continues joint the benefit of survivorship is enjoyed by all the members male or female.

The result of a member's death may be stated thus:—If he dies leaving male issue, he may be deemed to exist in them; for certain purposes he may be deemed to exist also in his widow, so long as the family continues joint; otherwise, excepting for the purpose of the maintenance of his widow and maiden daughter, if any, and the marriage of the latter, his existence may be ignored as regards the joint-property, which continues to be enjoyed by the survivors as before: and their rights are, on partition, determined in the same way as if the deceased never existed, except for the purposes mentioned above.

But not such order as in succession.—Hence, although there is an order of devolution as between different branches, there is no preference given to any of the members of the same branch by reason of his being nearer in degree than another. For instance, if a family consists of three brothers, and one of them dies leaving two sons, and then another dies without male issue leaving the two fraternal nephews and one brother surviving him, then the surviving brother, though nearer, cannot claim the undivided one-third interest of the sonless deceased brother to the exclusion of the nephews who are more remote in degree. The sonless deceased brother's interest passes to the surviving brother and the nephews; and on partition between the uncle and the nephews, the joint property is to be divided into two equal shares, one of which is to be allotted to the uncle, and the other to the two nephews; *Debi Parshad* v. *Thakur Dial*, I.L.R., 1.A., 105 (F.B.); *Bhimul Doss* v. *Choonee Lall*, I.L.R., 2 C., 379 (F.B.). It should be observed that, if the sonless deceased brother had been separate, the surviving brother alone would have taken his estate to the exclusion of the nephews.

Exclusion of female heirs and daughter's son.—The effect of this rule of devolution by survivorship is said to exclude the widow, the daughter, and the daughter's son in all cases, if the member dies without leaving male issue. A member's grandfather's great-grandson's grandson living jointly with him, takes by survivorship his undivided interest to the exclusion of his widow: *Ratan* v. *Modhoo*, 2 C.L.R., 328. Should the circumstances of the family be such that a female heir of the deceased would be entitled to a share on partition, then she cannot be said to be excluded except in the sense of her not being entitled to claim a share if the family continues joint. The widow, however, cannot properly be said to be

excluded ; for the subordinate or imperfect co-ownership acquired by her on her marriage, cannot reasonably be assumed to be destroyed by the husband's death, because its incidents cannot but be admitted to continue in the shape of the legal charge on her deceased husband's co-parcenary interest, for her maintenance, residence, and religious expenses, subject to which the same may be said to pass to male co-parceners. It should be remembered that according to Hindu law, she became her husband's co-owner, and what is now mistaken to be merely an *equitable charge*, is the incident of her co-ownership which subsists after the husband's death, and to which are referrible her rights in his estate, *i.e.*, in his co-parcenary interest in the family estate.

Charges on undivided share passing by survivorship.—It has already been indicated that the maintenance of the widow and the maiden daughter of a deceased co-parcener, and the marriage expenses of the latter, are charges on his co-parcenary interest. And so are the maintenance of the deceased's mother, and also of his dependent members such as his widowed daughter, and the *sradh expenses* of himself and the said persons. If he leaves any male issue excluded from inheritance for any cause other than being outcasted, then such issue and his family are also to be maintained out of the deceased's undivided interest. The co-sharers taking it by survivorship are liable for these charges to the extent of the said interest. They are also, according to Hindu law, similarly liable for his debts which form a charge on the interest left by him ; but our Courts of justice have not, up to the present day, enforced this liability.

Illegitimate brother of a Sudra taking by survivorship.—It has been held by the Calcutta High Court following certain Bombay decisions (I.L.R., 11 C., 702), that in a Sudra family governed by the Mitákshará a *dási-puttra* or illegitimate son by a slave girl, is a co-parcener with his legitimate brother in the ancestral estate, and will take by survivorship ; and this view has been upheld by the Judicial Committee : *Jogendro Bhupati* v. *Nityanand*, I.L.R., 18 C., 151 = 17 I.A., 128.

I have not been able to understand and follow the reasons upon which the above conclusion is based. According to the Mitákshará, an illegitimate son, like a maiden daughter, is not *entitled* to any share when the partition is made during the life-time of the father, except at the pleasure of the father. But when *partition is made* by the legitimate sons, after the death of the father, they are directed to allot a half share

to an illegitimate son, in the same way as a quarter share to a maiden daughter, of the father. When there is no legitimate son, an illegitimate son may take the whole estate, provided there be no widow or legitimate daughter or her son, in which case the illegitimate son takes half. It is not easy to find out, as to when does an illegitimate son become a co-parcener in the ancestral estate; if he had been so, during the lifetime of the father, his right to a share could not have depended on the father's choice; he would have been entitled to a share in his own right independently of the father's discretion. Nor can rules of succession and survivorship apply to the same ancestral estate; and, therefore, it cannot be said that he acquires by *succession* a title, on the death of the father, to a half of the father's undivided share, the other half devolving by *survivorship* to the legitimate sons. How again is the co-parcenary interest of an illegitimate son affected by the existence of a legitimate daughter or her son? A son takes even the father's separate estate by survivorship and not by succession, except when he has been separated from the father. The correct view seems to be that Section xii of the first Chapter of the Mitákshará, which concludes the subject of partition, succession being dealt with in the next chapter,—deals with the position of an illegitimate son to whom the preceding sections cannot apply, and defines his rights generally. He is no more a co-parcener than the father's wife, who is entitled to a full share on partition. And it is doubtful whether he is entitled to any share when there is a single legitimate son, that is to say, whether he has a right to demand partition. Accordingly, it was held by the Madras High Court in several cases that, he was not entitled to claim partition: (I.L.R., 7 M., 407; I.L.R., 8 M., 557), the ordinary incident of his *status* being held to be a right to be maintained (I.L.R., 10 M., 334). But subsequently the said Court thought itself bound by the above decision of the Privy Council to hold that he is a co-parcener and as such entitled to enforce partition: *Thangam* v. *Suppa*, I.L.R., 12 M., 401.

Can a female member take by survivorship?—It has already been said that a lawfully wedded wife or *Patní*, becomes from the moment of her marriage, the co-owner of her husband with respect to all his property; and it is by virtue of this right, that she becomes entitled to a share at a partition between her husband and his male descendants, or at a partition between the latter. But she is not entitled to a share in

other circumstances, for instance, if her husband dies without leaving male isssue. And then it is supposed that his undivided interest* passes to his surviving brother or other collateral male co-sharer, to the exclusion of his widow. If that were so, then what becomes of her co-ownership with the husband, or right to the family property acquired through her husband from the moment of her marriage? According to the true view of the principles of Hindu law it must be held to subsist even after the husband's death, whose interest only, as distinguished from her interest, can only pass to surviving male members, and she continues to get maintenance out of his property by virtue of that interest; her subordinate capacity to get a share or not, at a partition which she can never demand or enforce, is no criterion of the existence or non-existence of that interest. But according to another view, this interest is said to be extinguished by the death of the husband, the co-ownership subsists only during their joint lives. This view, however, appears to be erroneous, as it is inconsistent with the reason for recognising this co-ownership, which reason subsists even after the husband's death. It has already been observed that the wife's co-ownership is admitted to account for her enjoyment of the family property, which continues even after the husband's death in the same manner as before: why should then her co-parcenary, of which her enjoyment is the effect, be held to cease? The only change that takes place is that the husband's male relations step into his position with respect to his interest and become her guardians or protectors. But the law relating to females has been misunderstood and misconstrued in a manner detrimental to their interests, and it has been held that a widow of a deceased coparcener living jointly with the last surviving male member of the family, is not entitled to take by survivorship (*Ananda* v. *Nownit*, I.L.R., 9 C., 315); although there is an earlier case *Mt. Bhagwani* v. *Gopalji* S. D., N. W. P., 1862, Vol. 1, p. 306, in which was taken the contrary view which alone is consistent with the original principle underlying the recognition of her coownership as well as with reason, equity and justice. For, suppose a man died leaving two sons and his widow, and then one of the sons dies leaving his mother, widow, and brother behind him; and then the surviving brother, who became entitled to the whole family property, together with the female members who are his co-parceners though in a subordinate character by reason of their sex,—dies leaving his

widow, the mother and the brother's widow; it is but just and equitable that these three ladies whose position was the same during the lifetime of the male member, should jointly take the estate by survivorship, and not the last male member's widow alone, to the exclusion of the other two; for, the law of succession applies only to the estate left by one *separated* from his co-heirs, not to that of one who had been a member of a joint family, but had no male co-parcener at the time of his death, and on that ground cannot be deemed *separate* at the time of his death. Two different principles of devolution are enunciated by the Mitákshará school, namely (1) *survivorship* applicable to joint family property and (2) *succession*, to the estate of a person separated from his co-parceners by partition, when provision is made for every member male or female. And accordingly, to the estate under the charge of the deceased in the foregoing circumstances, the rules of devolution of joint-family property, but not the rules of succession, should be applied, the female members being according to the true principles of Hindu law, his co-parceners though in a subordinate character, and as such entitled to participate equally the joint estate by survivorship. Curiously, however, the law has been strained against females on many points, as will be shown hereafter.

9. *Partition.*

An agreement or a family arrangement not to partition— joint family property or a part of it, introduces a restriction which is repugnant to the interests of the co-parcaners, and is inconsistent with Hindu law. Restrictions relating to the enjoyment of property absolutely transferred are declared void by the Transfer of Property Act, section 11. On the same principle, a restriction against making any division for twenty years, imposed by a testator on his sons to whom he gave all his property, was held void as being a condition repugnant to the gift: (*Mokoond* v. *Gonesh*, I.L.R., 1 C., 104). An agreement between co-parceners never to divide certain joint property is held by the Bombay High Court to be invalid by Hindu law, and not binding even on the parties to the same: (*Ramlinga* v. *Virupakshi*, I.L.R., 7 B., 538.) An agreement at partition of the family property that one of the co-parceners shall get one-fourth of the net income of a certain village from the eldest brother who is to manage the same, is held to be no bar to a suit for partition of his one-fourth share, brought by that

co-parcener : (*Subba* v. *Raja*, 25 M., 585). Such an agreement or family arrangement is held by the Calcutta High Court to be binding on the actual or immediate parties thereto, but not on a purchaser from one of the parties, nor on their heirs, far less on a purchaser from an heir : *Ram* v. *Anund*, 2 Hyde 93 ; *Rajendra* v. *Sham*, I.L.R., 6 C., 106 ; *Krishnendra* v. *Debendra*, 12 W.N., 793. The purchaser from a party to such an agreement, cannot be in a better position than his vendor, except by invoking the doctrine of notice, or unless it be held that the agreement is not binding even on the parties themselves. A distinction, however, is drawn between the parties on the one hand, and their heirs and assignees on the other, with respect to the binding character of agreements taking away ordinary legal incidents of property : 4 M.H.C.R., 345.

What is partition.—The tenure of joint property by the members of a joint family governed by the Mitákshará, is characterized by community of interest, unity of possession, and common enjoyment; there is no question of shares during jointness; the members are said to be joint in food, worship and estate. And the Mitákshará theory of joint rights is, that each co-parcener's right extends to the whole family property, in which every member has an interest, but no definite share.

Partition, according to the Mitákshará, is the adjustment into specific portions, of divers rights of different members, accruing to the whole of the family property; in other words it is the ascertainment of individual rights which are never thought of during jointness.

The word 'partition' or 'division' may be employed to mean either a division of interest or a division of possession, or both. In connection with the Mitákshará joint families, it means severance of interest and consequent defeasance of survivorship.

At whose instance ?—Partition may take place under the Mitákshará by the desire of a single male member, who is therefore entitled, at his pleasure, to put an end to the joint-tenancy so far as he himself is concerned : the other members must submit to it, whether they like it or not : *Balkishen* v. *Ram*, 30 I. A., 139 ; *Mt. Deo* v. *Dewarka*, 10 W.R., 273 ; *Pirthi* v. *Jowahir*, I.L.R., 14 C., 493; 8 W.R., 15 ; I.L.R., 5 A., 430 (grandson). Accordingly, an execution purchaser of a member's interest, as well as a purchaser of the same for value in Bombay and Madras, are entitled to demand partition in right of that member.

The majority of a full Bench of the Bombay High Court have held that although it is now settled law in all the Presidencies that under the Mitákshará, a son can claim partition of ancestral immoveable property inherited by the father, whether he assents to it or not, yet a son cannot in the lifetime of his father sue his father *and uncle* for partition of such property, against the will of the father : *Apaji* v. *Ram*, I.L.R., 16 B., 29.

The decision seems to be due to a misapprehension of the meaning of a passage of the Mitákshará. There cannot be the slightest doubt in the mind of a Sanskritist on reading the original passages of the Mitákshará (Ch. I, Sect. v), that no such restriction on the son's right, as is supposed by the majority of the learned judges to be imposed by paragraph 3 of that section, is really intended to be laid down by that treatise. It should be borne in mind that the Mitákshará is a running commentary on Yájnavalkya's Institutes : after having explained in paragraph 2, the text cited in paragraph 1 of Sect. 5., Ch. 1, and before citing and commenting on the next text, the commentator sets out the importance of the next text, by the introductory remark that, but for the next text, two positions which are not correct propositions of law, might be deduced from the preceding passage, and that the same are obviated by the next text ; and then he goes on to explain the next text, and in the course of doing so, lays down in paragraph 5, that partition does take place, and that it does take place not by the father's choice only, thereby necessarily implying that it takes place by the son's desire as well ; and thus the commentator shows that the two positions mentioned in the introductory passage in paragraph 3 are obviated as not being tenable as correct propositions of law, by the next text asserting co-equality of father's and son's right. But the above mistaken view of the majority of the F. B. judges has been dissented from, and the correct view taken by the Hindu Sanskritist judge in the minority, is approved by the Madras High Court in the case of *Subba* v. *Ganasa*, (I.L.R., 18 M., 179) and by the Calcutta High Court in the case of *Rameswar* v. *Lachmi*, I.L.R., 31 C., 111.

Minor member.—With respect to partition during minority of one or more members, the Judicial Committee observes as follows.—"There is not doubt that a valid agreement for partition may be made during the minority of one or more of the co-parceners. That seems to follow from the admitted right

of one co-parcener to claim a partition, and if an agreement for partition could not be made binding on minors a partition could hardly ever take place. No doubt, if the partition were unfair or prejudicial to the minor's interests, he might on attaining his majority, by proper proceedings set it aside so far as regards himself:" *Balkishen* v. *Ram*, 30 I. A., 139, 150 = I.L.R., 30 C., 738.

A suit for partition may be brought on behalf of a minor member on the ground of malversation or corrupt or bad management or other circumstances shewing that separation of his share would be beneficial for him: (*Damoodur* v. *Senabutty*, I.L.R., 8 C., 537 ; 19 B., 99), although the minor should, by the partition, be deprived of the right to take by survivorship, which is but a contingent right ; which circumstance will not therefore deter a Court of justice from securing the existing interest of the minor by ordering partition even against the father, if it appears advisable that the minor's share should be set aside, and secured for him: *Bhola* v. *Ghasi*, I.L.R., 29 A., 373 ; *Mt Deo* v. *Dwarka* 10 W.R., 273.

A minor cannot be made liable for the defalcations committed by his guardian in respect of the joint property, unless he is proved to have derived benefit therefrom : and therefore at partition his share cannot be burdened with the guardian's liabilities : *Sonu* v. *Dhondu*, I.L.R., 28 B., 330.

What constitutes partition for defeating survivorship.—When partition may take place at the instance of a single co-sharer, whether the other members assent to it or not, it would appear that the declaration and communication by a member of a joint family, of his desire for separation, to the other members, accompanied and followed by unequivocal conduct and acts showing that so far as lay in his power he did give effect to his desire, and showing that there was a fixed and determined intention, and not a passing whim, for separation—is legally sufficient to change his status, to sever his interests and to constitute him a tenant-in-common and separate, so as to defeat the mutual right of survivorship so far as that member is concerned, *i.e.*, between him on the one hand, and the rest of the members on the other. As regards the enjoyment of the family property there is no difference between a Dáyabhága joint family and a Mitákshará joint family ; although in the one case the members are deemed to hold as joint-tenants, and in the other as tenants-in-common, by reason of survivorship

being recognized in the one, but not in the other. The distinction is a purely metaphysical one, and is founded on intention or a particular state or process of the mind: the members of a Mitákshará joint family may agree to cease to hold the family property as joint-tenants without dividing the same by metes and bounds—without, in fact, doing any physical act in respect of the property, and continue to live together but as tenants-in-common, like a Bengal joint family. Hence, when a member expresses his desire to become separate, as he is legally entitled to become whenever he chooses, whether the other members wish or not, there arises a coresponding duty on the part of the other members to give effect to his desire immediately; and as no physical act is absolutely necessary for a legal severance of interest, the verbal agreement of the co-tenants being sufficient for that purpose, and as the other members are legally bound to agree to the desired partition, and as Equity presumes that to be done which ought to have been done, it appears to follow as a necessary direct logical consequence that a member's desire for partition is sufficient in law to constitute him separate so as to put an end to his joint tenancy and the operation of survivorship.

So far as our High Court is concerned, the question appears to be settled by a series of decisions in which it has been held that the unequivocal or unmistakeable signification or declaration by a member of a joint family, of his fixed or determined intention to become separate would be sufficient to effect his separation or division of his title and severance of his interest, although division of possession, or partition by metes and bounds, of the joint property be not made. That a declaration of intention attended by conduct showing its determined character, has the effect of causing *change in the status*, and *conversion of the title* from *joint-tenancy* to *tenancy-in-common*, is the only legitimate conclusion deducible from the principles of the Mitákshará law, especially the doctrine that *partition must take place by the desire of a single member*, and the *other members must submit to it* whether they like it or not. The Bengal High Court have arrived at this conclusion in the following cases: *Bulakee* v. *Mt. Induputtee*, 3 W. R., 41; *Mt. Vato* v. *Rowshun*, 8 W.R., 82; *Debee* v. *Phool*, 12 W.R., 510; *Mt. Phoolbas* v. *Lall Juggessur*, 14 W.R., 340, 345-46; *Joy* v. *Goluck*, 25 W.R., 355, *affd.*, I.L.R., 4 C., 434, 437; *Raghabanund* v. *Sadhu*, 4 C., 425, 430; *Radha* v. *Kripa*, 5 C., 474; *Ram* v. *Lakhpati*, 30 C., 231.

The same view is expressed in the *Vyavahára-Mayúkha* the only Sanskrit commentary that deals with the question in a pointed manner: it says—"Even when there is a total failure of common property, a partition may certainly be made, also by *a mere declaration—'I am separate from thee:'* for, partition is certainly only a kind of mental state (or intention); this declaration makes the same only known." (Stoke's H.L. Books, p. 47.) It should be noticed that this passage clearly implies that partition is *a fortiori* effected by a mere declaration of intention to separate when there is joint property. But there seems to be some misconception about this point, as will appear from an examination of the decisions, which do not seem to be uniform.

It should be remarked that the essential idea involved in the conception of partition, is the division of the right to, or the severance of the interest in, the joint property: there may be separation in residence and food without there being separation in estate (*Badamoo* v. *Wazeer*, 5 W.R., 78; *Rewun* v. *Mt. Radha*, 4 M.I.A., 137, 168 = 7 W.R., P.C., 35; *Chhabila* v. *Jadavbai*, 3 B. H. C. R., 87); and, conversely, there may be a division of right without there being any separation in food and dwelling; for the sake of convenience, the members may live in commensality, each contributing his share of the expenses.

There may likewise be a definement of shares to which the members would have been entitled had there been a partition, in the Revenue Records, under the Land Registration Act, without any one of them having the remotest idea of separation: *Ambika* v. *Sukhmani*, I.L.R., 1 A., 437; *Hoolash* v. *Kassee*, I.L.R., 7 C., 369. The intention to separate is the important and principal thing to be regarded; even the enjoyment by different members of different portions of property (*Ram* v. *Sheo*, 10 M.I.A., 490), or the division of income for the convenience of the different members, would not amount to partition in the absence of intention: (*Sonatan* v. *Joggut*, 8 M.I.A., 86). While partition may be presumed from what shows an intention for it, such as opening separate accounts in the Collectorate (*Tej* v. *Champa*, I.L.R., 12 C., 96; *Ram* v. *Debi*, I.L.R., 10 A., 490), or separate enjoyment of different portions of property, (I.L.R., 15 B., 201), or participation of income in distinct and defined shares (I.L.R., 5 A., 532; 23 W.R., 395), taken in conjunction with other circumstances.

In *Appovier's* case, (11 M.I.A., 75 = 8 W.R., P.C., 1), the Privy Council held that actual partition by metes and bounds

is not necessary for completion of division of right; an agreement by the members to hold their property in defined shares, without actually severing and dividing it, takes away from it the character of being joint and undivided; the joint-tenancy is severed and converted into a tenancy-in-common; it operates in law as a conversion of the character of the property, and an alteration of the title of the family, converting from a joint to separate ownership and is sufficient in law to make a divided family and to make a divided possession, without actual partition of the subject-matter: 8 W.R., 116=*Doorga* v. *Mt. Kundun* 21 W.R., P.C., 214; *Tej* v. *Champa*, I.L.R., 12 C., 96. The same view is repeated by their Lordships in the recent case of *Balkishen* v. *Ramnarain* (30 I.A., 139), and it is further held that the document allotting to each member a defined share in the joint family property being unambiguous, its legal construction and effect could not be controlled or altered by the subsequent conduct of the parties.

But conduct is an important factor as is observed by their Lordships in a recent case,—"But here again the conduct of the parties must be looked at, in order to arrive at what constitutes the true test of partition of property according to Hindu law, namely, the intention of the members of the family to become separate owners": *Ram Persad* v. *Lakhpati*, I.L.R., 30 C., 231=7 W.N., 162.

In these cases, there were agreements to separate without actual division, and it was held that the question in every particular case must be one of intention to effect a division. In one case, it was held that when a deceased co-owner had not merely declared his intention for partition but done everything that lay in him to carry it out, and when failure to do so was the result of the co-heir's determined opposition, it would be allowing the co-sharer to benefit by his own wrong, if he were to succeed by survivorship to the exclusion of the deceased's widow: *Joy* v. *Goluck*, 25 W.R., 355.

But there are some Bombay decisions in which it has been held that, notwithstanding a suit and a judgment or a decree for partition, the plantiff who died before decree or execution of it respectively, is not to be deemed to have become separate, and that therefore survivorship applied to his share (I.L.R., 4 B., 157; 24 B., 182 construes 4 B., 157 as contemplating future partition and confines its operation to a very exceptional case; I. L. R. 6 B., 113—a case of death during appeal, of one

member). But these are opposed to the decisions of the Privy Council in which it has been held that the judment or the decree in a suit for separate possession effects severance of interests, if the same has not been already effected : *Joy* v. *Goluck*, 25 W.R., 355 *affed.* I.L.R., 4 C., 434 ; *Chidambaram* v. *Gauri*, I.L.R. 2 M., 83 = 6 I.A., 177 ; I.L.R., 24 B., 182.

In one case it has been laid down that there must be definement of shares, and distinct and independent enjoyment, in order that the mother may claim to have a share, right to which was held to be *created* by partition,—*Judoonath* v. *Bishonath*, 9 W.R., 61. Both the principles herein laid down appear to be erroneous, and this case will be considered later on.

Thus all the cases do not appear to be reconcilable. In each of these cases, the Court had to consider whether, having regard to the facts and circumstances of the particular case, the members were joint or separate in estate. The courts appear to have dealt with the question as one of fact, and have only incidentally referred to the legal principle on the subject, without fully discussing and deciding what is absolutely necessay to constitute severance of interest.

But one important point is settled by the decisions of the Privy Council, namely, that division by metes and bounds is not necessary, but an agreement by the members that henceforth the joint property shall be the subject of separate ownership, is sufficient to cause division of right. It is also settled beyond all dispute that such an agreement may be verbal :—*Rewun* v. *Radha*, 4 M.I.A., 137 = 7 W.R., P.C., 35.

Let us now consider what are the necessary logical consequences of these decisions, taken in conjunction with the doctrine of the Hindu law, that partition may take place by the desire of a single member. According to the view taken by the Privy Council the members become separate from the time of the agreement ; that is to say, no physical act beyond the verbal agreement, or interchange of words conveying mutual consent, was considered necessary to effect severance of interest, in the particular case. From the moment they agree to separate, the status of the family becomes changed, though nothing else is done, and they may live together as before, as they must, for some time. But partition must take place by the desire of a single member, and the others are bound to consent and agree to it. Therefore, the declaration by a member of his desire for partition to the other

members, accompanied or followed by conduct evidencing its earnestness, must be sufficient to cause the severance of his interests. That is all that he can do: if the others do not agree, but obstruct his desire, and compel him to continue to live with them for some time as before, they cannot be permitted by both law and equity to prejudice his right, and to gain an advantage by their such wrongful omission. He should thenceforward be deemed to live with them in the same manner as a member of a joint family governed by the Dáyabhága, that is to say, as a tenant-in-common, and no longer as a joint-tenant.

Partition is, no doubt, defined as the adjustment into specific portions of the joint property, of divers rights accruing to the whole of the same: it means, the ascertainment of the share or proportion of the joint property, receivable by a co-parcener, which may be done in a moment; and it implies neither more nor less than the cessation of the other members' right to his said undivided fractional share or proportion, and the cessation of his right to the rest of the property *i.e.*, the convertion of his joint-tenancy into a tenancy-in-common.

And it is as has already been said, a settled doctrine of Hindu law that partition may be effected by the desire of a single member. Hence, according to both law and equity, a member of a joint family is to be deemed separate, as soon as he declares his desire to become separate, or does virtually declare himself separate, with the object of causing his share to devolve on his widow, daughter and daughter's son, to the exclusion of the male relations entitled to take by survivorship.

This view is consistent with the decisions in which it has been held that when the undivided co-parcenary interst of a son or the father is sold in execution, it is equivalent to partition and the father's wife is entitled to demand a share: *Bi'aso* v. *Dina*, I.L.R., 3 A., 88; *Pursid* v. *Honooman*, I.L.R., 5 C., 845.

Partition and liability to account.—It has already (p. 222) been said that the manager is liable to render an account, and it has been so held by a Full Bench of the Calcutta High Court (13 W.R., F.B., 75). There was an earlier case (9 W.R., 483) on the subject, which was virtually though not expressly, overruled by that Full Bench, and which appears to be founded on a misapprehension of the constitution of a joint-family-government, when the other members are adults. It is observed in that earlier case with respect to a family

composed of adult members,—"They manage the property together; and the *Kartá* is but the mouthpiece of the body, chosen and capable of being changed by themselves. The family may in this respect be likened to a Committee with the *Kartá* as Chairman".

A joint family would have been what is thus described, had it been composed of Englishmen who are distinguished by greater individuality and independence of character, and by far less reverence for age and authority, than the Hindus, amongst whom blind submission to the authority of the head of the family, be he the father or an elder brother, is the rule, when the family is joint. An European judge must always guard against the natural error of presuming that the people of this country feel and act in the same way, as Englishmen would do, if placed under the same circumstances.

In a Hindu family as in Hindu society, no two persons can be equal in rank and position, one must be superior and the other inferior: an elder brother managing the family affairs, is to be looked upon as father (Manu 9, 105), and conversely a younger brother is to be looked upon as son, an elder sister is to be looked upon as mother and a younger sister as daughter, an elder brother's wife is similar to the mother (D.B., 4, 3, 31) and a younger brother's wife is similar to a daughter-in-law. The idea of equality and liberty was unknown to the Hindu mind with respect to family government and social order, though of course the people of this country have now been learning this doctrine under the British rule.

The conception of the family government, such as is depicted in the above passage, is seldom if ever, found in practice. Autocracy is the rule, democracy is nowhere met with; never is a *Kartá* elected or changed; the senior member holds the office by usage. The *Kartá* is all in all, exercising complete authority as if he were the sole proprietor of the whole family property, so long as absolute trust and complete confidence reposed in him by the other members, remain unshaken: and the junior members seem to be entirely dependent on him, and never dare to look into accounts for the purpose of examining their *bona fides* during jointness; for, as soon as suspicion arises with respect to the *boná fides* of the *Kartá*, it must necessarily be followed by the disruption of the family. To be suspicious about the manager's good faith, and to continue joint, would be two inconsistent things. Hence the adult members other than the *Kartá* cannot be

supposed to take any part in the management, except as a servant by order of the *Kartá*. A wide door to fraud and misappropriation would be opened if the manager of the family be held not liable to account, on the ground of the other members being adults and their consequent supposed participation, or liberty to participate, in the management of the family; for oftener than not, managers of joint families are found to defraud the other members by misappropriating joint property and its proceeds, as undoubtedly they have the opportunity to do so with impunity, and also they have, oftener than not, the necessity for so doing by reason of having the largest family of their own to provide for, in comparison with that of younger members.

The manager's liability to account appears to consist of his duty to produce the account books for inspection and examination by, or on behalf of, the other members, but on the footing of what have actually been expended, irrespective of the question whether the expenditure was extravagant in scale, or improper on account of want of skill or absence of the desire to economize or save, provided the expenses were honestly incurred; and of the further duty to pay and divide the *surplus*, if any, found to exist on settlement of the account, of which he is presumably the custodian.

It would therefore appear that the existence of regular accounts of the whole income and expenditure, is a necessary condition to fix the manager with liability to render account. Hence where the income of the property is not much higher than what is sufficient for meeting the expenses of the family, and as a matter of fact the family has no regular account books, and where no account of expenditure was ever actually kept, although there may be collection-papers of small revenue paying estates, or undertenures, as is generally the case in the middle class families, it would be unjust to require the manager to render an account. In such cases the other members must accept the *ipse dixit* of the manager as to the property which is the subject of partition.

No difference in two schools.—The question however is not free from doubt and difficulty. According to the constitution of joint families, the management of its affairs is entrusted to the elderly member usually called the *Kartá*, who himself has an interest in its property, and is connected by ties of natural love and affection with the other members having an interest in the same. The expenditure of the income depends

entirely on his will, and he is entitled to spend every farthing of the income by adopting an extravagant scale of expenses, not being legally bound to economise and save. Partition is the only remedy to which the other members are entitled for protecting their interests, if the menagement be deemed negligent and prejudicial to the same. If they are indifferent and apathetic, and do not take care to protect their own interests, and should they be minors and if there is no body else to look after their interests, then they must submit to the management or mismanagement, there being no remedy unless fraud, dishonesty and misappropriation can be proved.

As regards management of joint families by the managing member, there is absolutely no difference between the two schools. The distinction between the two schools with respect to the nature of the title of co-heirs, and its incidents of alienation and survivorship does not in any way effect any difference on the present question. For, community of interest, which is the distinctive feature of jointness, and upon which the question depends, is common to both the schools; and the manager or any other member who has a large family of his own to maintain, and in consequence consumed the largest portion of the income during the minority of a member, cannot as well under the Dáyabhága as under the Mitákshará, be called upon to account for the excess consumption, by that member who had none to support except himself. The nature and character of the *community of interest* of the members of a Bengal joint family, clearly appears from the description by the founder of the Bengal school, of *re-union* consisting in the annulment of previous partition, with the stipulation that —"The property which is thine is mine; and the property, which is mine, is thine also:"—which was the state of things during jointness. It is therefore erroneous to suppose that there is such a difference between the two schools, that the aforesaid Full Bench ruling of the Calcutta High Court with respect to the manager's liability, may be correct in the Bengal school, but not so in the Mitákshará school, as has been held in a recent case by the Madras High Court while refusing to follow the same: *Bala* v. *Muthu*, I. L. R., 32 M., 271.

There appears therefore to be no distinction between the two schools; nor between an adult and a minor member, as neither of them has a right to an account of past transactions, *i.e.*, can call into question the propriety of past transactions, or hold the manager liable on the ground of the management

being grossly negligent or prejudicial to his interests, in the absence of fraud and misapropriation. But the case of a member ejected from the family house and excluded from the enjoyment of the family property is different, who is entitled to demand an account: *Krishna* v. *Subbanna*, I. L. R., 7 M., 564. The decisions on the question of the manager's liability to account do not seem to be harmonions: *Damodardas* v. *Uttamram*, I. L. R, 17 B., 271; *Bala* v. *Muthu*, 32 M., 271. In a case in which one of the members had squandered certain property worth Rs. 5,500 for his own purpose, it was urged that an account should be taken of the property, and it should be charged to his share, the Bombay High Court held, —"But we cannot allow it; as, if we allowed it, we should be acting contrary to the principle of law that in a partition suit no co-parcener has any right to an account of past transactions:" *Narayan* v. *Nathaji*, I. L. R., 28 B., 201, 208.

Share of father's wife.—Each of the father's wives is entitled to a share equal to that of a son on partition, whether it takes place during the father's life (*Sumrun* v. *Chunder*, I. L. R., 8 C., 17) or after his death; (*Damoodur* v. *Senabutty*, I. L. R., 8 C., 537; *Damodardas* v. *Uttamram*, I. L. R., 17 B., 271). She gets the share, in virtue of the co-ownership she acquires from the moment of her marriage, in her husband's property, by reason of her being the lawfully wedded wife or *Patni* of her husband: (*Jamna* v. *Machul*, I. L. R., 2 A., 315). It is erroneous to suppose that partition creates her right to get a share (9 W. R., 61); for, according to the Mitákshará (1, 1, 17 and 23) partition does not create any right, but it proceeds upon the footing of pre-existing rights.

It has been held that she is entitled to get her share even against the father's wish, in a case in which his conduct towards her was such as to entitle her to separate maintenance; but her right to the share was held not to depend on it: (*Dular* v. *Dwarka*, I. L. R., 32 C., 234). It should, however, be noticed that while dealing with the wife's co-ownership with the husband over his property, the Mitákshará distinctly says that the partition of the husband's property between husband and wife, at which a share is allotted to her, may take place *by the husband's desire, and not by the desire of the wife.* The question seems to be beset with considerable difficulty whether the share allotted to a wife at a partition may be severed from that of the husband so as to constitute a partition as between the husband and the wife, against the husband's desire.

She is entitled to get a share, not only of the ancestral property but also of the accretions thereto: *Isree* v. *Nasib*, I. L. R., 10 C., 1017; *Ganesh* v. *Jewach*, 31 C., 262.

If *strídhan* has been given to her by the husband or the father-in-law, whether by gift *inter vivos* or by devise, she is entitled to so much only as together with the *strídhan* so received, is equal to a son's share: *Jodoo* v. *Brojo*, 12 B. L. R., 385; *Kishori* v. *Moni*, I. L. R., 12 C., 165.

Although it is true that there is a close connection between her maintenance and the recognition of her co-ownership in the husband's property, (I. L. R., 23 A., 86; 5 B., 99; 31 C., 476), still it is erroneous to suppose that she gets the share in lieu of maintenance: this may virtually be true when the property is small, and the sons may relieve themselves of the liability to supply her with maintenance, by coming to a partition and allotting to her, a share. But this cannot be true when the property is very large, for in such a case she gets property far in excess of what is necessary for her maintenance. The real reason why a share is given to her will be explained in the Chapter on Female Heirs of both the Schools.

The share which she gets becomes her *strídhan*; for, the Mitákshará (1, 6, 2) distinctly says, upon the authority of a text of Yájnavalkya declaring succession to the mother's *strídhan* estate, that the daughters inherit this share, and in their default the sons, and thereby clearly implies that it becomes her *strídhan*. The same result follows by necessary implication, from the rule that she is to get only so much as together with the *strídhan* received from the husband and the father-in-law, would equal the share of a son; she must have the same sort of right in what she receives in addition to the *strídhan* as in the latter, *i.e.*, absolute right. The *obiter dictum* expressed to the contrary, (9 W. R., 61; I. L. R., 23 C., 262) is, therefore, not acceptable as being inconsistent with the Mitákshará. In the recent case of *Chhiddu* v. *Naubat* the Allahabad High Court has taken the correct view and pronounced that the share becomes *strídhan*: I. L. R., 24 A., 67; see also *Sri Pal* v. *Suraj*, I. L. R., 24 A., 82.

She cannot enforce partition, but she is entitled to get a share when partition does take place at the instance of male members, or when the interest of a single member is severed by execution sale: I. L. R., 3 A., 88; I. L. R., 5 C., 845.

With respect to the mother's share on partition by sons, the Judicial Committee observes,—"There is no doubt that

according to the law in force in Bengal, the mother, though not entitled to require a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral, or acquired by the employment of ancestral wealth. She may, of course, acquiesce in the division of property between her sons without claiming any share for herself; but there is no evidence of any such acquiescence in this case": *Ganesh* v. *Jewach*, 31 I. A., 10 = I. L. R., 31 C., 262. This was a case of Mithilá.

In Madras the father's wife is not entitled to a share, but only to maintenance: the texts providing for the allotment of a share to her are interpreted to intend the allowance of wealth sufficient for her support.

Grandmother's share.—The paternal grandmother also is entitled to a share on partition: *Badri* v. *Bhugwat*, I.L.R., 8. C., 649; *Purna* v. *Sarojini*, I.L.R., 31 C., 1065.

But according to the Allahabad High Court she is not entitled to any share: *Radha* v. *Buchhaman*, I.L.R., 3 A., 118.

Unmarried sister's share.—At a partition made by sons after the death of the father, they must allot a quarter share to a maiden sister (*Laljeet* v. *Raj*, 20 W.R., 336). The quarter-share is ascertained in this way; suppose the partition takes place between a man's three sons, two widows and two maiden daughters, then the property is to be divided into seven shares, and a quarter of one such share is to be given to each of the maiden daughters, and then the residue is to be divided equally between the sons and the widows: Mit., 1, 7, 5–8; *Damodur* v. *Senabutty*, I.L.R., 8 C., 539.

The commentators differ in the interpretation of the texts ordaining the gift of a quarter share to a maiden daughter; for instance, the Mithilá school maintains that by quarter share is intended property sufficient to defray the expenses of her nuptials; while the Mitákshará (1, 7, 5–14) asserts that the quarter share must be allotted, and not wealth sufficient for marriage in lieu of it; the Víramitrodaya argues out the conclusion that she is entitled to the quarter share in addition to the expenses of her marriage, when partition is made after the death of the father; but if it takes place before, she is not entitled to any share, but gets only what the father may give her.

Illegitimate brother's share amongst Sudras.—The half share to which an illegitimate son is entitled when partition takes place at the instance of, and amongst, the legitimate sons of a

Súdra, is to be ascertained in the same manner as the quarter share of an unmarried sister, the principle being the same ; but see *supra* p 253.

Common charges on joint property.—Provision must be made before distribution for common charges such as the maintenance of a widow not entitled to a share, and of one who would have been a sharer but is excluded from inheritance by reason of some bodily deformity and the like, as well as of other dependent members of the family. If some co-sharers have been initiated or married at the expense of the family, and the others are uninitiated or unmarried at the time of partition, then the prospective expenses for the initiation or marriage of the latter should be set apart: *Jairam* v. *Nathu*, I. L. R., 31 B., 54.

Marriage expenses.—The marriage is the last of the sacramental or purificatory ceremonies which a father has to perform on his child, hence provision is made for it when partition is made: Mit., 1, 7, 3–5. It would therefore be erroneous to suppose that the father is under no kind of obligation legal, moral or religious to celebrate the marriage of a son or daughter. But see *Govinda* v. *Devara*, I. L. R., 27 M., 206, in which a contrary view has been taken; and also *ante* p. 111.

Distribution *per stirpes* **not** *per capita.*—When a family consists of different branches, each of which is composed of unequal number of male members, then the division is to be made *per stirpes* and not *per capita*; if the common ancestor and his wife or wives are alive, then each of them is to get a share; and there should also be as many shares as there are branches consisting of male issue descended from him, one share being allotted to the members of each branch collectively: should there be an unmarried daughter of the common ancestor she must get a quarter share. In this manner the partition is to be carried out. Should there be any dissention amongst the members of any branch, and any one of them desire to separate, then the share allotted to that branch is to be distributed amongst the members of that branch in exactly the same mode of partition in which the first distribution is to be made as set forth above.

Partition, not necessarily separation of all members.—Thus partition may stop at the primary stage, that is to say, the members of each branch may, and oftener than not do, remain joint while the branches become separate from each other: (*Bata* v. *Chinta*, I. L. R., 12 C., 262; *Durga* v. *Bal*, 29 A., 93).

Similarly one member or one branch only may separate from the other members or branches, while the latter continue to live jointly as before. Hence partition or separation of one or some members is not incompatible with the jointness of the rest.

The whole thing depends upon intention. But yet a nice question arises which is not merely metaphysical but also practical by reason of being attended with different legal incidents of importance, namely, whether those who do not separate but continue to live together as before, are to be deemed *joint* or *re-united* or *separate?* On the one hand it may be said that there is a disruption of the unity even when only one member separates, inasmuch as there arises a conversion of title, from the joint-tenancy into a tenancy-in-common, as between those to whom a share is to be allotted for the purpose of ascertaining the share of the co-parcener desirous to separate, while those to whom collectively one share is given may be deemed joint: *Radha* v. *Kripa*, I. L. R., 5 C., 474. On the other hand it may be said that the mere theoretical allotment of separate shares to co-sharers who are to continue joint and whose shares are to remain undivided, which is made only for the purpose of calculating and ascertaining the share to be separately assigned to the member separating, cannot have the legal effect of causing a division of right, or severance of title, of the former; hence a separation of one member does not necessarily create a separation between the other members, nor cause the general disruption of the family: *Upendra* v. *Gopee*, I.L.R., 9 C., 817. According to the first view, the undivided members are to be deemed *re-united* (I.L.R., 11 M., 406); according to the second, they are to be considered *joint*; the distinction is an important one, for in re-union there is not survivorship as in jointness. But in such cases the *prima facie* presumption appears to be in favour of *separation*, in the absence of express agreement to continue joint or become re-united, as follows from the exposition of law in the following case.

In the recent case of *Balabux* v. *Rukhmabai* (30 I. A., 139 = I.L.R., 30 C., 725 = 7 W.N., 642) the Judicial Committee have explained the law, thus,—"It appears to their Lordships that there is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of

one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to re-unite must be proved like any other fact."—(I. L. R., 30 C., 736). The mere fact of continuing to live together and enjoy their property in common as before, affects the mode of enjoyment, but not the tenure of the property or their interest in it; the intention to subject the property to a division of interest is not inconsistent with that mode of enjoyment: (*Balkishen* v. *Ram*, 30 I. A., 139 = I. L. R,, 30 C., 738.) The numerical division would amount to partition, unless intention to remain united in estate, or to become reunited, be proved. See also *Ram* v. *Lakhpati*, I.L.R., 30 C., 231.

Acquired property and double share.- If any property is acquired with small aid from joint funds, but through the special personal exertion of a member, then he is entitled to two shares: *Sree* v. *Gooroo*, 6 W. R., 219; *Sheo* v. *Judoo*, 9 W. R., 61.

The same mode of partition should be applied to property which was self-acquired of a member, but has been thrown by him into the common stock, by reason of allowing the other members to enjoy it; that is to say, two shares should be allotted to the acquirer, who cannot be placed in a worse position than one acquiring property with slight aid from the joint funds, which must necessarily be enjoyed by all the members during jointness. Hence, if joint enjoyment by all the members cannot deprive the acquirer in the latter case, of his right to a double share, then there is no reason why an acquirer without any aid from the joint estate, should not get an additional share of the property acquired by him through his sole personal labour or capital. But such property appears to be held as absolutely joint, and liable to be distributed at partition without showing any consideration to the acquirer whose right to a greater share, however, was not claimed nor decided in the cases relating to such property: *Ram* v. *Sheo*, 10 M. I. A., 499; *Lal* v. *Kanhaiya*, 34 I. A., 65 = I. L. R, 29 A., 244.

Renunciation by a member of his share.—If a member is possessed of sufficient separate property, and therefore does not wish to take any share of the joint property, he may renounce his share. But the Mitákshará directs that some trifle should be given him at the partition, so that no claim may be advanced by his heir in future: see Text No. 7, p. 183; I. L. R., 11 M., 407. This renunciation has the effect of extinguishing his interest for

the benefit of all the other members. But it is argued that according to the Smritis the renunciation operates as alienation of one co-parcener's interest in favour of the others, and that if he can alienate in favour of the other co-parceners as a body, there is no reason why he should not be competent to do so in favour of one of them; and accordingly it has been held that he can do so: (*Peddayya* v. *Ramalingam*, I. L. R., 11 M., 406.) The argument, however, proceeds upon an assumption which does not appear to be correct; for, renunciation does not operate as *alienation*, but as *extinction* of the co-parcener's interest, according to the true intent of the Smritis. If it were alienation, it would be gift; but it has been held that a member of a joint family cannot make a gift of his undivided share (*supra* p 229). Accordingly, it has been held that a *release* by a son, of his co-parcenery interest in favour of the father inures for the benefit of the family including the releaser's then existing son: *Shivaji* v. *Vasant*, I. L. R., 33 B., 267.

Partial partition.—From what has already been said it is clear, that there can be a partial partition in the sense of some members remaining joint notwithstanding the separation of the rest, also in the sense of some property being divided by metes and bounds and the rest not being so divided. But it is unlikely that there should be a partial partition in the sense of there being a severance of interest as regards part only of the property, and not as regards the whole.

It appears to be settled that a suit by a member will not lie for partition of a portion only of joint family property: *Jogendra* v. *Jugobundhu*, I. L. R., 14 C., 122; *Venkayya* v. *Lakshmayya*, I. L. R., 16 M , 98.

But there seems to be a conflict of decisions on the question whether a purchaser of the undivided interest of a co-parcener in a *portion* of the joint family property can maintain a suit for *partition* of that *portion* only. It is argued that the purchaser cannot claim a higher position than the co-parcener and therefore a suit for partial partition of a portion of joint property will not lie: *Shiv* v. *Virappa*, I. L. R., 24 B., 128; *Kristayya* v. *Nara*, 23 M., 608; see also 13 M , 275; 20 M., 243.

It is no doubt true that each member's interest extends to the whole, and it is uncertain which property will on partition be allotted to a co-parcener. But if compulsory alienation by execution sale in all the provinces, and voluntary alienation by private sale in Madras and Bombay, of a co-parcener's undivided interest in *specified property* forming a *portion* only of the

joint estate, be permitted to take place, and be valid so as to create the purchaser's title to that particular property only: then either the purchaser on the one hand, or the rest of the family on the other, may bring a suit for partition of that portion only of the family property, for the purpose of obtaining separate possession of their respective shares: *Ram* v. *Mul*, I. L. R., 28 A., 39; *Ram* v. *Ajudhia*, 28 A., 50.

But the question is not free from difficulty: on the one side it may very reasonably be argued that the purchaser is only entitled to stand on the shoes of the co-parcener for the purpose of working out partition not of that particular property, but of the joint family property, and on equitable grounds the whole of that particular property may at such partition be allotted to another member, and some other property to that co-parcener whose interest was sold, but who had no right to claim a share of every item of the joint property partitioned: (*Hasmat* v. *Sunder*, I.L.R., 11 C., 396). On the other hand, the purchaser, specially the execution purchaser, may justly argue that the particular property was put up to sale and he paid the price for the debtor's share in the property sold which alone he desired to buy and did buy. The question depends on the validity of the sale of a portion of joint property; and if the sale be valid, then the purchaser acquires title to the particular property sold, and he cannot be required to accept some other property in its stead.

When a stranger is co-sharer of a portion of property belonging to a joint family, or when some only of the members are entitled to a portion, then a suit for partition of such portion only, would lie: I.L.R., 23 B., 597; 23 A., 216.

It should be noticed that although the purchaser may not, yet the members other than the vendor may, bring a suit for partition of only the particular property sold, there being none to object to it on the ground of its being brought for partial partition: (*Subramaya* v. *Padma*, 19 M., 267.) It would appear that such a suit by a purchaser is maintainable, if the other members do not object: 5 M., 362.

The result of cases seems to be that a suit will not lie for partition of a portion only of joint family property; even when the purchaser of the rights of a co-parcener sues for partition, the partition must be general; a suit for partition of only the property sold will not lie, unless the other members agree: *Jogendra* v. *Jugobundhu*, I.L.R., 14 C., 122; *Venkayya* v. *Lakshmayya*, I.L.R., 16 M., 98: *Shivmurteppa* v. *Virappa*, I.L.R., 24 B., 128.

But if some members of a joint family hold any property jointly, in which the other members of the family have no interest, then there may be a suit for partition of that property only between the joint owners thereof; and is not necessary to include in such a suit the other joint property to which all the members of the family are entitled, nor are the other members necessary parties to it: *Lachmi* v. *Janki* I.L.R., 23 A., 216.

Re-opening partition.—If a male child was in the womb of its mother at the time of partition, who would have been entitled to a share had he been then in separate existence, and the child becomes born alive subsequently to partition, then a share is to be allowed to him by re-opening the partition already made. But a son begotten after partition, or after renunciation by the father of his interest in the family property, cannot have any claim against his separated brothers, but his rights are limited to the then existing property of the father. A partition to which a member was not a party, or which was made during the minority of a member and was unfair or prejudicial to his interests, may also be re-opened at the instance of such member, in so far as he is concerned: I.L.R., 31 C., 262; 30 I.A., 139, 150.

If it be established that through mistake or error, whether it occurred by accident or design, some joint property was excluded from partition, then the omitted joint property is liable to partition, even if the error was not mutual; there may be re-opening of partition as well as of settled account: *Bhowani* v. *Juggernath* 13 W.N., 309.

Effect of partition and Limitation.—After change in his *status* by partition, a member can no longer be deemed as agent or representative of the family, and cannot maintain a suit to recover a debt due to the family: if he does, the other members can recover their shares by suit against him, provided it be instituted within the period allowed by Article 62, Article 127 being no longer applicable; for, the possession of one cannot be deemed possession of all, as after complete separation none can represent others: (*Vaidyanatha* v. *Aiyasamy*, I.L.R., 32 M., 191.)

A member of a joint family in exclusive possession of any joint property cannot plead limitation upon the ground of such possession, unless he has asserted an exclusive title to the knowledge of the co-parceners, and his possession become adverse, the burden of proving which lies on him (I.L.R., 25 B., 362). If a co-personer is excluded from his share, and

such exclusion is known to him, then he may be barred by limitation: Sch. ii, Art. 127; I.L.R., 3 C., 228). But mere non-partition in the profits does not amount to exclusion: *Sellam* v. *Chinnammal*, I.L.R., 24 M., 441.

10. Impartible things.

There are certain things that are not liable to partition. They are dealt with in the Mitákshará, Ch. I, Sec. iv, and in the Dáyabhága, Ch. iv. They are:—

(1.) Those that are not the subjects of joint right, *i.e.*, the separate property of a member;

(2.) The father's affectionate gifts of moveable property to his wife, male issue, daughter, or daughter-in-law are valid, if the subject matter of gift be small in comparison to the whole estate: (*Bachoo* v. *Mankore*, 34 I.A., 107=I.L.R., 31 B., 373, on appeal from 29 B., 51; *Hanmant* v. *Jivu*, 24 B., 547.) But he is not entitled to make such gift of immoveable property, or of a considerable portion of moveables: (*Raya* v. *Subba*, 16 M., 84; *Kama* v. *Chakra* 30 M., 452.) But the gift of immoveable property on the occasion of a daughter's marriage, may be valid as necessary marriage expense: *Rama* v. *Vengidu*, 22 M., 113). But a gift made to a daughter's father-in-law two years after her marriage, in consideration of a promised dowry,—is held invalid on the ground of the alienation being not necessary for the marriage: (*Ganga* v. *Pirthi* 2 A., 635.)

(3.) Certain moveables, though joint, used personally by the members severally, such as wearing apparel, or ornaments given to a female;

(4.) Those that cannot conveniently be divided, as for instance, a reservoir of water, the common pathway, the place for worship and pasturage;

(5.) Those that are impartible by custom, such as a *raj* or a principality, which may be the joint and undivided property of a family, but is exclusively held by one member only according to customary rules; the other members being entitle to get maintenance only, and under certain circumstances, to take possession of the estate by survivorship. This subject will be dealt with in a separate chapter.

11. Evidence and Presumptions.

Evidence of partition.—The Mitákshará (ch. ii, sect. xii) and the Dáyabhága (ch. xiv) deal with the evidence of

partition when there is a doubt about the fact of it having been made. The sum and substance of what is said in these works are as follows :—The evidence of partition may be of three descriptions, (1) a deed of partition भागलेख्य or विभागपत्र (2) testimony of witnesses, and (3) presumption or inference from conduct or circumstances : in other words, (1) documentary evidence, (2) oral evidence and (3) circumstantial evidence. The second is declared superior to the third, and the first is pronounced to be superior to the second and *a fortiori* to the third.

i. The documentary evidence consists of a deed or instrument of partition. But it should be borne in mind that neither a partition-deed, nor division by metes and bounds, is necessary for effecting partition.

ii. The oral evidence or the testimony of witnesses consists of the depostion of persons aware of the *factum* of partition, being present when the same was made. They may be *Sapindas* or near agnate relations, or *Jnatis* or remote agnate relations, or cognates, or stangers : their competency and the value of their testimony are declared to be in the order of the enumeration, the first among these being preferable to the next in order.

iii. The principal circumstance indicative of jointness is the common chest or till into which the income of the joint family is brought, and in which the surplus, after meeting the necessary expenditure out of it, continues to remain as the common fund. Hence separate income, separate expenditure and separate till are the tests of separation.

Other circumstances giving rise to a presumption of separation are,—separate transactions, separate gifts and acceptances, separate acquisitions of property, separate fields for cultivation, separate domestic animals, separate houses for residence, separate servants, separate stores of food-grain, separate cooking, separate religious ceremonies, and mutual transfer of property or one advancing loan to another, as well as declarations and conduct from which the intention to separate clearly appears.

But the principal thing to be regarded is the separation or jointness in estate ; and the criterion or test of the jointness in estate is the common chest for keeping the income of the joint property, from which are met the necessary legitimate expenses of all the co-parceners and their respective families, without any account of the equal or unequal propor-

tion of the expenditure for each co-parcener; for, the expenses of all members must be met from the family fund irrespective of the amounts of shares to be allotted on partition, before which there is community of interest; and the surplus, if any left after defraying the family expenses, remains there forming the joint fund of all.

The circumstances stated above are the elements to be taken into consideration in determining the question, whether there has been a partition; but none of them is conclusive, since a member may be separate in residence, worship and mess without being separate in estate, and *vice versa*. Accordingly, the cesser of commensality though a very important element, has been held to be not conclusive; 31 I.A., 10. Each case is to be decided according to its peculiar circumstances, all of which may not tend to the same conclusion. See pp. 259 *et seq*.

The difficulty, however, arises when one member separates, while the others continue joint as before: for, in order to ascertain the share of that member, the shares of all must be ascertained, that is to say, there must be a numerical division seeming to amount to partition or virtual separation of all. But if the other members continue not only to live together and enjoy their property in common as before, but keep their common chest and joint funds and joint expenditure in the same way as before, unaffected in the least by the division, then they cannot but be presumed to be joint and united, not being really separated by the numerical division.

It may be argued that the same elements are found in a Dáyabhága joint family, but still its members are deemed tenants-in-common, and not joint-tenants. That is no doubt true, but they are so by the operation of the law of Bengal, and not by the intention of the parties. In both cases there is community of interest the distinctive feature of jointness in estate, and so the intention of the members with respect to enjoyment is the same, but the law annexes different incidents to the same state of things, and accordingly while they are held to be joint-tenants in the one school, they can never be so under the other.

Presumptions.—Where a partial partition is admitted or proved to have taken place, the *presumption* would be that there has been a complete and entire partition: 32 M., 191.

The joint family system is the normal condition of Hindu Society. Hence having regard to this peculiar feature of social

organization, certain *presumptions* arise, which form a part of the Law of Evidence, and are only indicated here. They are :—

1. That the relations that may naturally be members of a joint family are joint : any one alleging separation must prove that fact. The Judicial Committee observed in the case of *Neel Kristo Deb Burmon*,—"The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption ; but the members of the family may sever in all or any of these three things."—12 M.I.A., 523, 540 = 12 W.R., P.C., 21. See also 19 W.R., 178 ; 22 W.R., 248.

2. If it is admitted or proved that a family was once joint, there arises a presumption in favour of the continuance of jointness : I.L.R., 18 A., 176.

3. Where it is established that considerable nucleus of ancestral property had been received by the father at the time of partition from his brothers, and only one general account was kept for the savings of the ancestral property, and of the earnings of himself and his sons, which were all blended together so as to form one common stock of the joint family consisting of the father and sons, into which not only the earnings of every member and but also the income of purchased property were thrown, and that the father did not discriminate between the different sources of his income,—the *onus* was held to be on the defendants who claimed under the father's will to prove that the property devised was his self-acquired : and it was further held that the purchases made by the father with the funds so obtained could not be regarded his self-acquired property : *Lal* v. *Kanhaia* 34 I.A., 65 ; *Anandrao* v. *Vasantrao*, 11 W.N., 478.

But in a suit by a son against a purchaser from his father, of a portion of a village, part of which was the father's ancestral and the rest his self-acquired property, it was held that the *onus* was on the son to prove that the disputed portion was not self-acquired but *ancestral*, *i.e.*, unless the lands came to their father by descent from a lineal male ancestor in the male line, they are not deemed *ancestral* in Hindu law : *Atar* v. *Thakar*, 35 I,A., 206.

4. That the property in possession of any such relation is joint property belonging to all the members : he must prove that it is his separate property, if he says so : 5 W.R., P.C., 11 and 67 ; I.L.R., 8 C., 517.

5. That any property purchased in the name of such a

relation is joint acquisition, provided there be a nucleus of joint funds wherewith the purchase might be made. But if there be no nucleus, the presumption does not arise; and the same is rebutted, should the nucleus be not more than what is sufficient for the maintenance of the family: 8 W.R., 226; 10 W.R., 122; 20 W.R., 158.

6. There are some recent decisions which seem to be in conflict with the above decisions laying down the presumptions, in which it has been held that if the parties are not members of a joint family when the suit is instituted, then the presumptions do not arise: I.L.R., 3 C., 315; I.L.R., 9 C., 237; I.L.R., 18 A., 90. But these rulings appear to apply to the peculiar facts in those cases, and are distinguishable; and are construed as not laying down any general principle.

There are conflicting decisions (15 W.R., 357; I.L.R., 10 C., 686; I.L.R., 8 M., 214), as to whether a property purchased in the name of a female member should be presumed to be joint family property. Considering that every Hindu female has separate property and that she is not a co-ordinate co-owner of the joint family property, the foundation of this presumption is wanting in her case. In the case of a male, the presumption says that he is not the sole owner; whereas in the case of a helpless female, it says that she has no right to the property, she is merely a *benamdar* for the male members. When, however, a widow as heiress of her husband is a co-sharer of her husband's agnate relations, as she often is in a Bengal joint family, then, no doubt, the presumption may properly be applied to a purchase in her name; but not otherwise.

There is no presumption that property acquired by a Hindu widow who has inherited her husband's estate, forms part of that estate: *Dakhina* v. *Jagadis*, 2 W.N., 197. It has also been held that there is no presumption that property which was in possession of such a widow, had belonged to her husband: *Diwan* v. *Indarpal*, 26 I.A., 226.

See Mayne's Hindu Law and Usage §§ 289–91, for fuller information on the subject of Burden of Proof with respect to jointness of property.

7. When the father's creditor seeks to recover his dues from ancestral property by suit against sons, the *onus* is on him to prove that he had made enquiry before lending the money, that it was not required for immoral or illegal purposes: *Maharaj* v. *Balwant*, I.L.R., 28 A., 508.

CHAPTER VI.

MITÁKSHARÁ SUCCESSION.

ORIGINAL TEXTS.

१। पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा ।
तत्-सुता गोत्रजा बन्धुः शिष्यः सब्रह्मचारिणः ॥
एषाम् अभावे पूर्व्वस्य धनभाग् उत्तरोत्तरः ।
स्वर्यातस्य ह्यपुत्रस्य सर्व्ववर्णेष्वयं विधिः ॥ याज्ञवल्क्यः, २,१३६-१३७।

1. The lawfully wedded wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles (or agnates), cognates, a pupil, and a fellow student; on failure of the first among these, the next in order is heir to the estate of one who departed for heaven leaving no male issue: this rule extends to all classes.—Yájnavalkya ii., 136-137.

अपुत्रस्य धनं पत्न्यभिगामि, तदभावे दुहितृगामि, तदभावे पितृगामि, तदभावे मातृगामि, तदभावे भ्रातृगामि, तदभावे भ्रातृपुत्रगामि, तदभावे बन्धुगामि, तदभावे सकुल्यगामि, तदभावे शिष्यगामि, तदभावे सहाध्यायिगामि, तदभावे ब्राह्मणवर्ज्जं राजगामि ॥ विष्णुः ।

The wealth of a sonless person goes to the wife; in her default, goes to the daughter; in her default, goes to the father; in his default, goes to the mother; in her default, goes to the brother; in his absence, goes to the brother's son; in his default, goes to the Bandhus (*i.e.* Sapindas); in their default, goes to the Sakulyas; in their absence, goes to a pupil; in his default, goes to a fellow student; in his default, goes to the King, excepting the property of a Bráhmana:—Vishnu.

२। अनपत्यस्य पुत्रस्य माता दायम् अवाप्नुयात् ।
मातर्य्यपि च वृत्तायां पितुर्माता हरेद्-धनम् ॥ मनुः, ९।२१७॥

2. Of a son dying childless, the mother shall take the estate, and the mother also being dead, the father's mother shall take the heritage.—Manu ix, 217.

३। न भ्रातरो न पितरः पुत्रा रिक्थहराः पितुः ॥ १८५ ॥
अनन्तरः सपिण्डाद्-यः-तस्य तस्य धनं भवेत् ।
अत ऊर्द्ध्वं सकुल्यः स्याद्-आचार्य्यः शिष्यः एव वा ॥ मनुः, ९,१८७।

3. Not brothers, nor fathers, but sons (male issue) take the father's property. To the nearest *Supinda* the inheritance next belongs; after them, the *sakulyas*, the preceptor of the Vedas, or a pupil:—Manu ix, 187. See *supra* p. 51.

४ । आत्मपितृष्वसुः पुत्रा आत्ममातुः स्वसुः सुताः ।
आत्ममातुलपुत्राश्च विज्ञेया ह्यात्मबान्धवाः ॥
पितुः पितृष्वसुः पुत्राः पितुर्मातृष्वसुः सुताः ।
पितुर्मातुलपुत्राश्च विज्ञेया पितृबान्धवाः ॥
मातुः पितृष्वसुः पुत्रा मातुर्मातृष्वसुः सुताः ।
मातुर्मातुलपुत्राश्च विज्ञेया मातृबान्धवाः ॥ मिताक्षराधृतवचनं ।

4. The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, are known as his own *Bandhus*; the sons of his father's father's sister, the sons of his father's mother's sister, and the sons of his father's maternal uncle, are known as his father's *Bandhus*; the sons of his mother's father's sister, the sons of his mother's mother's sister, and the sons of his mother's maternal uncle are known as his mother's *Bandhus*.—Texts cited in the Mitákshará without name of their author.

Mitákshará Succession.

The law of succession—laid down in the above two slokas of Yájnavalkya, applies according to the Mitákshará to the estate left by a male who was *separated* from his co-heirs and *not re-united* with any of them; see Mitákshará, 2, 1, 30. Although it might be contended with good reason, that according to the Mitákshará school, the three different modes of devolution therein propounded, of a deceased man's property, according as he was joint, or separated, or re-united, apply to the *whole* of the estate left by him; yet as regards devolution by survivorship on the ground of the deceased having been joint and undivided with his co-parceners, it is now settled by judicial decisions that survivorship applies only to such property as the deceased got as *unobstructed* heritage, *i. e.*, to property in which co-parceny was acquired from birth, or which is inherited from the father or other paternal male ancestor, or from the maternal grandfather, and to accretions, if any, to such property; see *supra* p. 188; but it does not apply to his separate property, nor even to other descriptions of joint property, such as jointly inherited as *obstructed* heritage from female ancestors, or from maternal uncles or from separate

paternal collateral relations, or jointly acquired by common labour, or with separate funds of each; such joint property, the co-sharers are deemed to hold, as tenants-in-common and not as joint-tenants. But it should be observed that the other two courses of succession apply to the *whole* estate left by the deceased.

Survivorship and succession.—It should be noticed that in a case of succession, a person acquires ownership in another man's property to which he had no right before the latter's death: whereas, survivorship applies to property, to the whole of which the survivor had a right from before, and the death of a joint tenant simply removes a co-sharer having a similar right to the whole, and thereby practically augments the pre-existing right of the survivor in some cases, but does not create any new right in him.

Death natural and civil.—According to Hindu law a person's ownership of property becomes extinguished by death *natural* or *civil*, and succession to his estate opens to his heirs. Civil death consists of (1) *degradation* on account of heinous sin for which the sinner becomes an *outcaste*, (2) adoption of a religious order, and (3) extinction of temporal affection: D.B., 1, 31.

The order of succession—is founded on the above two slokas of Yájnavalkya, (Text No. 1), and is moulded by the joint family system, the normal condition of the Hindu society. All male relations are heirs in their order; and the primary classification for that purpose is into *gotrajas* or gentiles or agnates, or those connected through males only, or members of the same family, and into *bandhus* or cognates, or those connected through a female, or those belonging to a different family. The former, however distant, are preferred to the latter however near they may be. There is a single exception introduced by the fiction of interpretation, namely, the daughter's son, who is said to be implied by the particle (च) "also" used after the term "daughter" in the above text (No. 1) of Yájnavalkya, which is taken to include something not expressed.

The *gotrajas* are divided into two groups, namely, *sapindas* and *samánodakas*, of whom the former succeed in preference to the latter.

The order of succession amongst the *sapindas* is worked out on the analogy of the order so far as it is given in the above text, namely, that among the parents, the brothers and their sons.

Proximity of relationship is, upon the authority of the

above text of Manu (Text No. 3), propounded as the principle on which the order is to be worked out; but it has not been completely worked out, so our Courts will have to do it, following the analogy of the order such as is given in the Mitákshará.

Females, as a general rule, are excluded from inheritance save and except such as have been expressly named as heirs.

But this rule of exclusion has been departed from by the Bombay High Court by recognizing agnate female *sapindas* as heirs, and by the Madras High Court by recognizing the right of female relations to succeed as *bandhus*.

From the Mitákshará is deduced the following—

Order of Succession.

1-3. **Separated son, grandson and great-grandson.**—If the male issue were joint and undivided with the deceased, they would take even his self-acquired property by survivorship and not by succession; *Ramappa* v. *Sithammal*, I. L. R., 2 M., 182,

The right of representation obtains amongst the divided male issue; hence, a grandson by a pre-deceased son, and a great-grandson whose father and grandfather are both pre-deceased, succeed together with a son: *Marudayi* v. *Doroisami*, I. L. R., 30 M., 348.

It should be remarked that the right of representation does not obtain amongst any other heirs, so that the nearer will take in preference to one more remote; for instance, a brother will exclude the son of a pre-deceased brother.

The male issue again take *per stirpes*, and not *per capita*: suppose a man dies leaving two grandsons by one pre-deceased son, five grandsons by another pre-deceased son, and one great-grandson being the son of a pre-deceased grandson by a third pre-deceased son, then his estate is to be divided into three equal shares, one of which is to be allotted to the two grandsons by one son, another to the five grandsons by another son, and the remaining one to the single great-grandson descended from the third son.

It should be borne in mind that the division *per stirpes* applies only to the male issue in the male line; all other heirs take *per capita;* for instance, if the succession goes to the daughter's sons or the brother's sons, then if one daughter or brother leaves one son, another three sons, and a third five sons, the estate is to be divided into nine shares, one of which is to be allotted to each of the daughter's or brother's sons.

4. The lawfully wedded and loyal wife.—In default of the male issue, the *Patni* or the lawfully wedded wife succeeds, provided she was loyal to the husband.

A lawfully wedded wife is one married in any one of the approved forms of marriage ; see *supra* p. 86. A wife espoused in a disapproved form is not recognised as heir. The Sanskrit term साध्वी पत्नी is generally rendered into "Chaste wife" ; and it is thought that the absence of physical unchastity entitles the wife to succeed. But a woman's character may be above all suspicion, and she may be purity personified, but if she does not love her husband, refuses to live with him, and habitually acts contrary to his wishes, then she cannot inherit from him, for she is not *sádhvi.* The term साध्वी *sádhvi* rendered by Colebrooke into "Chaste" is thus defined by Manu,—

पतिं या नाभिचरति मनोवाग्-देह-संयता ।
सा भर्तृलोकम् आप्नोति सद्भिः साध्वीति चोच्यते ॥ मनुः, ५, १६५ ।

which is rendered by Sir William Jones thus,—

"While she, who slights not her lord, but keeps her mind, speech, and body, devoted to him attains his heavenly mansion, and is called *sádhvi* or virtuous by good men." Manu v. 165.

The condition of loyalty or chastity applies to the wife only, and not the other female heirs.

A wife who is not entitled to inherit, is entitled to maintenance provided she was and continues chaste.

The wife inheriting the husband's estate, does not become absolutely entitled to it, but takes only what is called the *widow's estate* in the same. On her death it goes to her husband's next heir, not to her heirs. This is according to judicial decisions, but not according to the Mitákshará which maintains that property inherited by a woman becomes her *stridhan.* This is another instance in which the law has been strained against females.

Two or more widows take in equal shares ; on the death of one, the surviving widow takes her share. They are held to take as joint-tenants and their joint-tenancy is peculiar, as it is deemed unseparable ; accordingly, there cannot be a partition or division of their title, though for the convenience of enjoyment there may be an arrangement for separate possession of distinct portions of the estate. This subject is discussed in detail in Ch. xii. *infra.*

The widow of a Hindu inherits his estate in the character of being his surviving half, or continuing the widowed wife of

her deceased husband; in other words, the Hindu widow's estate lasts *durante viduitate:* her re-marriage, whether legalised by the Hindu Widow's Re-marriage Act No. XV of 1856, or by custom, will divest her of the deceased husband's estate, whether she marries according to Hindu rites or not: *Matungini* v. *Ram*, I.L.R., 19 C., 289; *Rasul* v. *Ram*, I.L.R., 22 C., 589. But mere unchastity in the absence of re-marriage will not divest: *Keri* v. *Moniram*, 19 W.R., 367 affd. I.L.R., 5 C., 776.

There are, however, different grades of unchastity; and it is of the gravest character when followed by conception and birth of child. In that case she must be divested of the husband's estate: the passages of Hindu law on this subject are not translated into English and were not before the Court in the unchastity case, some of them will be cited in Chapter X.

The widow is also divested by the adoption of a son unto her husband, legally made by herself or by her co-widow: see *ante* pp. 173-176.

5. **Daughters.**—In default of the widow, the daughters are heirs; of them, one who is unprovided takes in preference to one who is provided.

A daughter has been held to take only a widow's estate; on her death it goes to her father's heir; a surviving daughter will take what is left by a deceased daughter, 22 W.R., 496 = I.L.R., 4 C., 744.

Unchastity of a daughter is no ground of exclusion from inheritance: I.L.R., 4 B., 104.

6. **Daughter's sons.**—In default of daughters, their sons take the inheritance of their meternal grandfather, they take *per capita* in equal share.

7. **Mother.**—After the daughter's son, comes the mother, or the adoptive mother, who takes in preference to the father: (*Anandi* v. *Hari*, 33 B., 44). The Víramitrodaya says that a chaste and virtuous mother is preferred to the father; otherwise, the father takes before the mother. From this it appears that unchastity does not exclude the mother from inheritance, nor re-marriage: I.L.R., 5 M., 149; *Basappa* v. *Rayava*, 29 B., 91.

The mother also has been held to take the widow's estate.

8. **Father.**—After the mother comes the father; but they take in the reverse order according to the Bengal School.

9. **Brothers.**—Brothers of the whole blood take to the exclusion of the half brothers. In default of the former, the latter take.

Whole and half blood.—The preference based upon connec-

tion by whole blood, applies to all collateral relations of equal degree; propinquity being the principle of the order of succession, a relation of the full blood by reason of his proximity excludes a relation of the same degree, who is of the half blood.

All Sanskrit lawyers appear to entertain this to be the traditional true construction of the Mitáksharà, according to which propinquity is the only principle of the order of succession, it is on this principle alone that the whole brother and his son are preferred respectively to the half-brother and his son; and the reason applies *mutatis mutandis* to the other collateral relations: *Suba* v. *Sarafraz* I.L.R., 19 A., 215. The Mayúkha does not follow the Mitáksharà, and places the half-brothers together with the grandfather in the order of succession after the grandmother and the sister, and the half-brother's son after some other relations; see *Samát* v. *Amra*, I.L.R., 6 B., 394: and following an *obiter dictum* in this case it has been held by the Bombay High Court that the preference based on whole blood does not apply to any other relations, and that therefore a paternal uncle of the half blood inherits jointly with one of the whole blood: *Vithal* v. *Ram*, I.L.R., 24 B., 317. This view is inconsistent with the Mitáksharà, nor does it seem to be supported by the Mayúkha which has introduced an innovation by giving undue preference to the whole blood by lowering the position of the half-brother and his son in the order of succession, contrary to what is given in the Mitáksharà, and contrary to the modern view in favour of abolition of the distinction between the relations of whole and half blood; this view has been accepted in the Indian Succession Act No. X of 1865, Section 23.

10. **Brother's sons.**—In default of both full and half-brothers, the succession devolves on the brother's sons; of them, a full-brother's son will take in preference to a half-brother's son.

(**Brother's son's son.**)—Contrary to what is clearly laid down in the Mitáksharà as well as in the Víramitrodaya, and contrary to what has hitherto been all along well understood by Sanskritists as the traditional true construction of these treatises, the Allahabad High Court have recently held that the brother's son's son should be placed just after the brother's son, and therefore preferred to the paternal uncle's son (*Kalian* v, *Ram*, I.L.R., 24 A., 128) according to the leading principle of the Mitáksharà, that the inheritance is to go to the nearest *sapinda*

It should be observed that both the principle and the working out of the order of succession according to that principle, rest on, and are deduced from, express texts of the sages : Yájnavalkya's and Vishnu's texts on the subject give the order of succession down to the brother's son (Mitákshará 2, 1, 2 & 6); Manu's text cited in the Mitákshará 2, 1, 7 and 2, 5, 2 places the father's mother after the mother. Having regard to these texts the author of the Mitákshará which is a running commentary on the Yájnavalkya's Institutes, to the text of which on this subjact, reference is made in Ch, 2, Sect 5, paragraph 1,—places the grandmother immediately after the brather's son. I am unable to understand on what ground the brother's grand son can be said to be nearer than the paternal uncle's son ; for according to the Hindu mode of computation the brother's grandson is distant by four degrees, and the first cousin by three degrees only. But the real principle which underlies the commentators' views on the order of succession, is the principle of natural love and affection moulded by the family organisation.

The joint family system is the key to the order of succession as it is to other branches of Hindu law. To an Englishman a descendant of the brother with whom he was associated during infancy must appear nearer than the paternal uncle's son. But in a Hindu joint family, it is more likely than not, that one is associated with his paternal first cousin from his birth and looks upon him as a brother. It should be borne in mind that even now brothers often separate after they have got sons; and it should also be borne in mind that a man's affections are formed when he is young; hence to a Hindu the paternal first cousin who was associated with him as a member of a joint family, must appear to be nearer than the brother's grandson who is born when he is too old to form a new affection, and also when he may, oftener than not, be separate from the brother. So what is expressly laid down in the Mitákshará is perfectly consistent with the sentiments of the Hindus governed by the Mitákshará. In Bengal the joint family may not continue so long as in the places where the Mitákshará prevails; but still in Bengal the brother's great-grandson is postponed to many other relations. It is not clear whether the learned Jndges of the Allahabad High Court meant to hold that he must be placed just after the brother's grandson; this would, however, be the necessary logical consequence of the *ratio decidendi* of that

decision. It is not correct to suppose that all the descendants below the grandson of the father would be cut off by the "stricter construction" of the Mitákshará, inasmuch as they are entitled to take as *sapindas* before the *samánodakas* according to that construction. It is submitted that what is called "*stricter* construction" by their Lordships, is the *only* construction which the language of the text admits of.

This decision however, has the effect of unsettling the well-understood order of succession in the Beneres School. The same order is found in the later commentaries of that school, namely, the Madana-Párijáta and the Viváda-Tandava. Sir W. Macnaughten explains the Beneres School of the law of succession in same order which the learned judges of the Allahabad High Court are pleased to describe as the order following from a *stricter construction* of the Mitákshará, but which appears to be, as remarked above, the *only construction* the passages admit of.

11. Paternal grandmother. -But see *Kalian* v. *Ram*, I.L.R., 24 A., 128.

12. Paternal grandfather.
13. Paternal uncle.
14. Paternal uncle's son.
15. Paternal great-grandmother.
16. Paternal great-grandfather.
17. Paternal grand-uncle.
18. His son.

19-30.—Similarly, and in the same order, the **paternal grand-parents of the 4th 5th and 6th degrees in ascent, and their two male descendants.**

31-57. Then come **the remaining Sapindas**; Mit. 2, 5, 5; (*Bhyah Ram* v. *Bhyah Ugur*, 13 M.I.A., 373), the order in which they take is not stated, but is to be gathered by analogy from the foregoing order: it appears to be as follows,—

31-33 The deceased's **male descendants,** if any, **of the 4th, 5th and 6th degrees** in descent, beginning with the great-great-grandson. These must be separated from the deceased; for if they were joint and undivided with him, then they would take by survivorship in preference to all other heirs.

34-37. The **father's 3rd, 4th, 5th and 6th descendants** beginning with the fraternal nephew's son. But I.L.R., 24 A., 128 *contra*.

38-41. The **paternal grandfather's 3rd, 4th, 5th and 6th descendants** beginning with the paternal uncle's son's son.

42-57. Similarly and in the same order, should come the **3rd, 4th, 5th and 6th descendants in the male line of the paternal great-grandfather and of his father, grandfather and great-grandfather :** the descendants of the nearest ancestor must come before those of a remoter ancestor; and of these descendants, the nearer in degree will take in preference to one more distant.

58-204. The **Samanodakas** come after the *Sapindas* : they are thirteen descendants of the deceased himself, his thirteen ascendants, and thirteen descendants of each of these thirteen ascendants—all in the male line; from these the *sapindas* are to be deducted, then the remaining 147 relations come within the term *Samánodakas*. They are the distant agnate relation. According to some, the term includes remoter distant relations of the same *gotra*, if the relationship can be traced and is remembered.—*Kalka* v. *Mathura*, 35 I.A., 166 = 13 W.N., 1.

This enumeration, however, is, to a great extent, theoretical; for, no man can live to see and leave behind descendants to the thirteenth degree, of his nearer ancestors, far less of himself, nor even see the remoter ancestors and their nearer descendants.

The order of succession amongst these appears to be governed by two principles, namely,

(1) The descendants of a nearer ancestor succeed in preference to those of a remoter ancestor.

(2) Amongst the descendants of the same ancestor the nearer excludes the more remote.

Bandhus.

Bandhus or cognates come after the gentiles. While explaining the order of succession the Mitákshará (Mit., 2, 5, 3) says,—"After the paternal grandmother, the *sapindas* of the same *gotra* such as the paternal grandfather become heirs," and then it is observed,—

भिन्नगोत्राणां सपिण्डानां बन्धुशब्देन ग्रहणात् ।

which means,—"For, the *sapindas* belonging to a different *gotra* are included by the term *bandhu* (in the above text of Yájnavalkya, cited in Mit., 2, 1, 2)."

The heirs down to the great-grandfather's son are then set forth; and it is then laid down that,—"In this manner is to be understood the succession of the *sapindas* of the same *gotra*, (*i. e.*, agnate relations to the seventh degree, according

to the Hindu mode of computation, which is the same as that of the canonists.)"

In Colebrooke's translation of this part of the Mitákshará, the term *sapinda* is erroneously rendered into "one connected by funeral oblation." The learned translator appears to have thought that this term bears the same meaning in the Mitákshará, as in the Dáyabhága.

This error in the rendering given by Colebrooke, was rectified by Messrs. West and Búhler, who gave in their very learned and valuable Digest of Hindu Law (3rd Edition, pages 120-122), the translation of the passages from the *Achára-kánda* of the Mitákshará, in which *sapinda* relationship is explained for the purposes of marriage.

It is laid down in the *Achára-kánda* of the Mitákshará (which explains the text of Yájnavalkya on marriage, 1, 52), that wherever in that work the term *sapinda* is used it must be taken in the sense of a "relation or one connected through the same body" and not in the sense of "one connected through funeral oblations."

And while explaining the text of Yájnavalkya ordaining that the intended bride should be beyond the fifth and the seventh degrees respectively on the mother's and the father's side, the Mitákshará says that *sapinda* relationship is by this text limited in the said manner, and explains and illustrates the mode of computing the five and seven degrees. This text and the exposition relates to marriage only : for, it is not said that this difference in the number of degrees on the two sides, is applicable to other purposes as well.

Messrs. West and Buhler have translated a portion only of the passage of the Mitákshará, in which this subject is dealt with ; the concluding sentence of their translation is misleading, which runs as follows,—"and thus must the counting (of the *sapinda* relationship) be made in every case."

For, this has given rise to the error of supposing that this curtailment of *sapinda* relationship applies to inheritance also. Hence the translation of the entire passage of the Mitákshará has been given in pp. 52-56 *supra*, from which it is clear that the exposition of *sapinda* relationship therein given, is intended only for the purposes of marriage. See *supra*, pp. 68-80, where the question as to who are included by the term *Bandhu* has been discussed at length.

It would appear that according to Hindu Law all relations are heirs ; they are divided by Yájnavalkya and the Mitákshará

into two classes, namely, the *gotrajas* and the *bandhus*, or agnates and cognates, or those belonging to the same family, and those belonging to a different family; the latter as a body are postponed to the former; excepting the daughter's son.

The fact that the Mitákshará cites the text of Vrihan-Manu (Text No. 2, p. 50) for explaining the *sapinda* and the *samánodaka* relationship for the purpose of inheritance, shows that what is said in the Achára-kanda for the purpose of marriage is inapplicable to inheritance.

Hence, the *bhinna-gotra sapindas*, who are according to the Mitákshará included by the term *bandhu*, may be taken to mean any relation, however distant, belonging to a different family whose relationship can be traced; for, the term *sapinda* wherever used in the Mitákshará, must be taken in the sense of one connected through the body.

But if its meaning is to be curtailed by taking the word *sapinda* in a limited sense, then it should be taken to extend to seven-degrees on both the maternal and the paternal sides; for, in the text of Vrihan-Manu as well as in the text of Manu (p. 50), no distinction is drawn between the two classes of relations.

The only ground for circumscribing the heritable right of cognate relations by curtailing the degrees of *sapinda* relationship of cognate heirs, is a curious novel interpretation of the grammatical comments by the two commentators of the Mitákshará on the words of a text Manu cited and explained by the author himself of the Mitákshará, which interpretation is contrary to the author's own interpretation of that text, which is cited where the mother's succession is dealt with. The original passage of the Mitákshará and its English version are as follows:—

किं च पिता पुत्रान्तरेषु अपि साधारणः, माता तु न साधारणी इति प्रत्यासत्त्यतिशयात्—

अनन्तरः सपिण्डात् यः, तस्य तस्य धनं भवेत्

इति (मनु) वचनात् मातुरेव प्रथमं धनग्रहणं युक्तं। न च सपिण्डेषु एव प्रत्यासत्ति र्नियामिका, अपितु समानोदकादिषु अपि अविशेषेण धनग्रहणे प्राप्ते, प्रत्यासत्तिरेव नियामिका, इति अस्मात् एव वचनात् अवगम्यते,—इति मातापित्रोः मातुरेव प्रत्यासत्त्यतिशयात् धनग्रहणं युक्ततरं।

which means,—

Moreover, by reason of the greatness of *propinquity* in consequence of the father being a common parent to other sons also, but the mother being not a common parent (to sons other than their common issue),—and by reason of the ordinance of Manu, namely,—"To the nearest *sapinda*, the inheritance next belongs"—the succession in the first instance, of the mother alone is reasonable.

Nor is *propinquity* the regulating principle (of the order of succession) among *sapindas* (technically so-called) only; but on the contrary, it is known from (the language of) this very ordinance (of Manu) that when succession to the estate opens without distinction, to the *samánodakas* and the like also (as groups of relations), *propinquity* alone is the principle regulating order. Hence, as between the parents, the succession of the mother alone is more reasonable.

It should be observed that the author takes the word *sapinda* in its primary sense, namely, *relation* (*supra* pp. 52 *et seq*).

The wording of the above text of Manu is very peculiar; the following is its literal rendering,—

"He who is unremote from *sapinda*, his property becomes his."

This peculiar language induced the two commentators of the Mitáksharâ to offer the grammatical comments on this text for the purpose of explaining its meaning: *supra* p. 56. They never dreamt that they should be understood for the first time at the last quarter of the 19th century to lay down a novel proposition of law. The discovery of the same was made by a Tagore Professor of law, who puts forward the absurd doctrine that in order that A may be a cognate heir of B, they should be *sapinda* of each other, as if there may be any conceivable case in which A may be B's *sapinda*, but B is not A's *sapinda*. It is absolutely impossible, as the word *sapinda* is a correlative term, so there cannot but be mutuality in every case without a single exception.

It is to be regretted that such a view should appear to be approved by the High Court, by reason of its being embodied in their judgments as *obiter dictum* : *supra* p. 75.

Case-law on Bandhus.—While dealing with the order of succession among *bandhus*, the Mitáksharâ (2, 6, 1), on the authority of a text whereof the author's name is not mentioned, divides the *bandhus* into three classes, namely; (1) one's own *bandhus*, (2) the father's *bandhus*, and (3) the mother's *bandhus*, and enumerates nine relations as such, thus :—

One's own *bandhus* are his own	...	Father's sister's son. Mother's sister's son. Mother's brother's son.
Father's *bandhus* are his father's	...	Father's sister's son. Mother's sister's son. Mother's brother's son.
Mother's *bandhus* are his mother's	...	Father's sister's son. Mother's sister's son. Mather's brother's son.

In *Giridhari Lal Roy* v. *Bengal Government*, 12 M. I. A., 448, the Lords of the Judicial Committee held that the above enumeration is not exhaustive, and therefore the maternal uncle and the father's maternal uncle are *bandhus* and, as such, entitled to succeed. In coming to this conclusion their Lordships relied upon the Víramitrodaya,—where it is laid down that the term *bandhu* comprises also the maternal uncle and the like; and the reason assigned is that it would be improper to hold that their sons are heirs, if they themselves, though nearer, were not so : Víramitrodaya, p. 200.

Two other relations not falling within the enumeration have been held by two Full Benches of the Bengal High Court, to be *bandhus* and heirs, namely, the sister's son in the case of *Omrit Kumari Debi*, 2 B.L.R., F.B., 28 = 10 W.R., F.B., 76, and the sister's daughter's son in the case of *Umaid Bahadur*, I.L.R., 6 C., 119. The decision in the former case, was founded on the doctrine of spiritual benefit ; but it has been held in the latter case that in the Mitákshará School inheritance is not based upon that doctrine. In the latter case an opinion has been expressed that the sister's daughter's son's son is not a *bandhu* nor an heir ; it is difficult to understand the principle upon which that opinion is based. See *supra*, pp. 69-76.

In the case of *Ananda Bibi* (I.L.R., 9 C., 315), it has been held that the father's maternal grandfather's great-grandson is a *bandhu* and heir. So also daughter's son's son (I.L.R., 11 M., 287), sister's son's son (I.L R., 20 M., 342), mother's maternal uncle's grandson (I.L.R., 5 M., 69), grandfather's sister's grandson (I L.R., 12 M., 155), have been held *bandhus* and heirs.

Order of succession among Bandhus.—The next point for consideration is the order of succession amongst the *bandhus*. In the Mitákshará and the Víramitrodaya it is said, that of the three classes of *bandhus*, the first class succeed in preference to the other two, and the second before the third. You will observe that the first class comprises relations connected through both

the parents; the second, those connected through the father alone; and the third, through the mother only: and that the relations of the first class are equal in degree but nearer than those falling under the second and the third classes. You will mark that the relations under the second and the third classes are all equal in degree, but differ in sides.

The following three rules therefore may be deduced from the above considerations, governing cases of competition between *bandhus*.

(1) The nearer in degree on whichever side is to be preferred to one more remote.

(2) Of those equal in degree, one related on the father's side is to be preferred to one related on the mother's side.

(3) When the side is the same, the circumstance of one being related through a male and another through a female makes no difference.

No light, however, is thrown by the above enumeration on a case of competition between a descendant, and a colleteral or an ascendant equal in degree, computed in the mode adopted by civilians; for instance, a son's daughter's son and a sister's son.

Other heirs.—When a man has no relation, then his Preceptor, Pupil, and Fellow-student are in their order, entitled to take his estate.

Fellow caste-people.—In default of all these, the estate of a Bráhmana goes to learned Bráhmanas, not to the king. But it has been held by the Privy Council in the case of the *Collector of Masulipatam*, 8 M.I.A., 500 = 2 W.R., P.C., 59, that the personal law of the Hindus relating to inheritance, by which they are permitted to be governed, cannot apply when there is a total failure of heirs; hence this provision of Hindu law cannot have any force and prevent the Crown as the *ultima hæres* to take by escheat the property left by a Bráhmana leaving no heir properly so called, namely, a relation.

King.—But the estate of a man of any other caste escheats to the king.

Female heirs in Bombay and Madras.—The above order of succession is according to the Benares and the Mithila Schools, in which female relations, as a general rule, are excluded from succession, save and except the widow, the daughter, the mother, the father's mother, and the paternal grandfather's mother.

In Bombay all the female *sapindas* of the same *gotra* are recognised as heirs, and they are shuffled in among the male

sapindas, namely, the full sister who is placed after the paternal grandmother but before the paternal grandfather (*Lallubhai* v. *Mankuvarbai*, I.L.R., 2 B., 445, affirmed 5 B., 110 = 7 I. A., 212), and is accordingly preferred to a brother's widow (I.L.R., 28 B., 82), but not to a brother's son : (32 B., 300) ; the half-sister (4 B., 188), the stepmother (11 B., 47), the widows of *gotraja sapindas* who occupy the place of their husbands, and the daughters of descendants and of collaterals : 4 B., 209 and 219 ; 9 B., 31. The sister is expressly enumerated as an heir in a Smriti text (*infra* p. 299) hence her claim is superior to that of other females born in the family but transferred to other families by marriage, who cease to be *sagotra-sapindas*, such as the father's sister, and are therefore postponed to *sagotra-sapindas;* accordingly the father's paternal uncle's son is entitled to succeed in preference to the father's sister : *Ganesh* v. *Waghu*, I.L.R., 27 B., 610.

But an illegitimate daughter cannot succeed in preference to a brother's son : *Bhikya* v. *Babu*, 32 B., 562.

In Madras certain female relations have been recognised as *bandhus* and heirs.

The rule that female relations cannot inherit save such as have been expressly named as heirs, and which is followed in Northern India, has been departed from in Bombay, on the ground that the female *sapindas* are expressly recognised as heirs by the following text of Manu as translated by Sir William Jones, namely—

"To the nearest Sapinda, *male or female*, the inheritance next belongs."

The italicized words which are not in the original, but were interpolated by the learned translator from Kulluka's commentary on Manu, were supposed to be important words of the text itself. And the rule has been departed from also in Madras on the ground that as the Preceptor and the like succeed, "if there be no relations of the deceased" (= बन्धूनाम् अभावे, Mit. 2, 7, 1), therefore by implication female relations must succeed before the Preceptor and the like. Accordingly son's daughter (I.L.R., 14 M., 149), daughter's daughter (17 M., 182), sister, and father's sister (13 M., 10), have been held heirs as *bandhus*.

The Allahabad High Court—also adopted and followed the above view of the Madras High Court, and held that in the absence of preferential male heirs, a daughter's daughter is heir to her maternal grandfather; *Bansi* v. *Ganesi*, I.L.R., 22 A., 338.

But it has recently been held by the said court that females not expressly enumerated as heirs, cannot inherit: accordingly, a son's or a daughter's daughter is held to be no heir to the grandfaaher: I.L.R., 28 A., 187 and 307.

CHAPTER VII.

RE-UNION UNDER BOTH SCHOOLS.

ORIGINAL TEXTS.

१ । (*a*) पत्नी, दुहितरश्चैव, पितरौ, भ्रातरस्तथा, ।
तत्सुताः, गोत्रजाः, बन्धुः, शिष्यः, सब्रह्मचारिणः ॥
एषाम् अभावे पूर्व्वस्य धनभाग् उत्तरोत्तरः ।
स्वर्यातस्य ह्यपुत्रस्य सर्व्ववर्णेष्वयं विधिः ॥

याज्ञवल्क्यः—२,१३६-७ ॥

(*b*) वानप्रस्थयतिब्रह्मचारिणां रिक्थभागिनः ।
क्रमेणाचार्य्य-सच्छिष्य-धर्म्मभ्रात्रेकतीर्थिनः ॥

याज्ञवल्क्यः—२, १३८ ॥

(*c*) संसृष्टिनस्तु संसृष्टी सोदरस्य तु सोदरः ।
दद्याच्-चापहरेद्-अंशं जातस्य च मृतस्य च ।
अन्योदर्य्यस्तु संसृष्टी, नान्योदर्य्यो धनं हरेत् ।
असंसृष्ट्यपि चादद्यात् संसृष्टो, नान्यमातृजः ॥

याज्ञवल्क्यः—२, १३९-१४० ॥

1. (a) The lawfully wedded wife, and the daughters also, both parents, brothers likewise, their sons, gentiles (or agnates), cognates, a pupil, fellow-students; on failure of the first among these, the next in order is heir to the estate left by one who has departed for heaven without leaving male issue: this rule extends to all castes.—Yájnavalkya, ii, 136-7.

(b) The heirs to the estate of a *brahmachari* or life long student, an *yati* or ascetic or religious mendicant, and a *vánaprastha* or hermit are respectively, the preceptor, a virtuous pupil, and a religious brother residing in the same holy place.—Yájnavalkya, ii, 138.

(c) But of a re-united (co-heir), a re-united (co-heir) shall keep the share when he is deceased, or deliver it if he is born in the shape

of a son), but of a uterine brother, a uterine brother shall keep the share, or deliver it (to his son) if (he is) born (in the shape of a son); but a re-united half brother may take the property, not a half brother (not re-united); also a (brother) united (through uterus, *i.e.*, a full brother) though not re-united may take, not the united, (*i.e.*, re-united) half brother alone.—Yájnavalkya, II, 139-140.

These two slokas are differently construed by different commentators: see Víramitrodaya, Chapter IV.

२। विभक्तो यः पुनः पिता भ्राता चैकत्र संस्थितः।
पितृव्येणाथवा प्रीत्या स तत्संसृष्ट उच्यते ॥ वृहस्पतिः ॥

2. He who having been separated dwells together again through affection, with the father, a brother, or a paternal uncle is called re-united with him.—Vrihaspati.

३। स्वर्यातस्य ह्यपुत्रस्य भ्रातृगामि द्रव्यं तदभावे पितरौ हरेयातां ज्येष्ठा वा पत्नी। शङ्खः ॥

3. The wealth of a person who departs for heaven leaving no male issue, goes to the brothers; in their default, let the parents take, or the senior wife.—Sankha.

४। या तस्य भगिनी सा तु ततोंऽशं लब्धुम् अर्हति।
अनपत्यस्य धर्म्मोऽयम् अभार्य्यापितृकस्य च ॥ वृहस्पतिः।

4. But if there be a sister of his (*i.e.*, of the re-united person), she is entitled to get a share of it, this is the law regarding the estate of a person destitude of issue, also destitude of the wife and the father.—Vrihaspati.

५। मृतोऽनपत्योऽभार्य्यश्चेद् अभ्रातृपितृमातृकः।
सर्व्वे सपिण्डास्तद्दायं विभजेरन् यथांशतः ॥ वृहस्पतिः।

5. If the deceased leave no issue, nor wife, nor brother, nor father, nor mother, then all the *sapindas* shall divide his property agreeably to shares (*i.e.*, in the order of proximity).—Vrihaspati.

RE-UNION, MITA'KSHARA' SCHOOL.

If two or more parceners after partition agree to annul the partition and to live together jointly as before, and make a junction of their property with the stipulation based on affection, that what is mine is thine and what is thine is mine, then they are called re-united, and their status, re-union. Mere living together in one residence without junction of estate is not re-union. Intention to re-unite must be proved: see *ante* p. 272.

According to the Mitákshará School, the circumstance of

two or more co-parceners being *re-united*, after separation from others by partition, modifies the order of succession to some extent.

This variation in the order of succession is based upon no principle such as survivorship, or proximity of relationship, on which is founded the devolution of the estate of one who is joint or separate respectively.

The order of succession applicable to the estate of a re-united person is entirely based on the above texts and a few others repeating the same thing, which are construed by the Beneres School to lay down an order different from the ordinary one. From the Mitákshará and the Víramitrodaya, is deduced the following

ORDER OF SUCCESSION :—

1–3. Son, grandson and great-grandson —inherit as in the ordinary case of succession, whether they are separated or re-united. A son who is re-united cannot claim preference to another who remains separate.

Because the above text of Yájnavalkya, [1. (c)] containing the rule giving preference to a re-united co-parcener, forms an exception to the rule contained in the text [No. 1. (a)], relating to the order of succession; and as the rule applies to the estate of a person destitute of male issue; therefore the rule itself does not apply to the male issue; hence, the exception also, to the rule, cannot apply to the male issue who are therefore entitled to inherit *per stirpes* whether re-united or not. For, separation or re-union of father and son depends on the disagreement or agreement of the female members, and not on the father's affection or on its absence.

4. Re-united whole brother.

5. A re-united half-brother, and a separated full brother jointly succeed; in default of the one, the other takes the whole.

6. Re-united mother.

7. Re-united father.

8. Any other re-united co-parcener.

9. A half-brother not re-united with the deceased.

10. The mother not re-united with the deceased.

11. The father not re-united with the deceased.

12. The widow.

13. Daughter.

14. Daugnter's son.

15. Sister.

Subject to this modification, the succession goes to the *sapindas*, the *samánodakas*, the *bandhus* and the rest, as in the ordinary order of succession, explained in Chapter VI.

A great deal of misconception appears to prevail on the subject of re-union; it is difficult for one who has no access to the original treatises, to clearly understand the law of re-union which seems to be arbitrary in character.

It is thought by some that survivorship applies to the estate of re-united co-parceners (20 W.R., 197; I.L.R., 17 C., 33). But this is evidently a mistake: for, there cannot be any doubt that a re-united half-brother, and a full-brother not re-united but remaining separate, succeed jointly to the estate of a re-united co-parcener; nor can there be any doubt that a separated full-brother of a person who became re-united with the parents or the paternal uncle, is entitled to succeed to that person's estate in preference to the parents or the paternal uncle who became re-united with him. Hence, it is clear that by re-union there is merely a mixture of the shares of those forming it, but the unity of their titles is not effected thereby, and so they become tenants-in-common having community of interest, but not joint-tenants having the benefit of survivorship.

It should moreover be observed that the advantage derived from being re-united is a personal privilege, which cannot be claimed by the sons of the re-united co-parceners although living jointly; for, re-union pre-supposes jointness and partition; hence, a re-united co-parcener is one who had been originally joint, then separated, and afterwards became re-united through affection with another co-sharer, by annulling the previous partition and mixing up their shares, and agreeing to live together as members of a joint family. Hence the very person who was joint at first, then separated, and then agreed to annul the separation and to become joint over again, is to be understood by the term "re-united." This is what is laid down by the above text of Vrihaspati (Text No. 2). Suppose, for instance, three brothers forming members of a joint family, separate from each other, then two of them become re-united, subsequently each of them has a son born to him, then all the brothers die one after another, each leaving a son behind him the two sons of the two re-united brothers continue to live joint, then one of them dies leaving the two first cousins with one of whom he lived jointly, while the other was separate: here the two first cousins living together cannot be called "re-united"; hence both the surviving cousins are entitled to succeed

to his estate according to the ordinary law of succession, the one living jointly with the deceased cannot claim preference, as he was not re-united. But see *contra*, *Abhai* v. *Mangal*, I.L.R., 19 C., 634.

The view expressed above appears to be approved by the Judicial Committee in the case of *Balabux* v. *Rukmabai*, (30 I.A., 130), in which it has been held (p. 272) that a re-union in estate properly so called can only take place between persons who were parties to the original partition. Their Lordships refer to the text of Vrihaspati cited in the Mitákshará ch. 2, sect. 9, as supporting that proposition.

The Mitákshará appears to limit re-union to the relations mentioned in that text of Vrihaspati, while the text of Yájnavalkya appears to predicate it of all relations that may be parties to partition. The latter view is maintained in the Víramitrodaya, Vrihaspati's text being taken as illustrative. The aforesaid order of succession applicable to the estate of a re-united person, is not found in its entirety in the Mitákshará, but is laid down in the Víramitrodaya which is held by the Judicial Committee to be declaratory of the law of the Beneres School: 12 M.I.A., 448.

There is also a good reason for considering the privilege to be personal and not heritable, for instance, two of three brothers may like each other and dislike the third, so they come to a partition and then the two become re-united. Now it is quite possible that each of the two brothers who dislike the third, may love his children in the same manner as the children of his re-united brother. Therefore the attachment being personal, the preference also should be of the same character.

It is worthy of remark that when a member of a joint family, re-unites with another member after partition, it shows that he does not repose much confidence in his wife, nor does he feel love and affection towards his daughter and her son, if he has any; for, the effect of re-union is to postpone the wife, the daughter and the daughter's son to a few of the agnatic relations. The legal incident of re-union again, that a brother succeeds in preference even to the parents shows that nearness of relationship is not the criterion of preference; but at the same time it shows that while the preference assigned to a brother cannot but be agreeable to the parents, it appears to be based on natural love and affection, as it excludes other remoter re-united relations such as the uncle or the nephew.

RE-UNION UNDER DAYABHAGA SCHOOL.

The above text of Yájnavalkyá is explained in the Dáyabhága to mean that when there is a competition between claimants of equal degree, then if any of them is re-united and the rest are not so, the re-united parcener will take the heritage to the exclusion of those who are not so. According to the Dáyabhága, the above texts do not lay down a different order of succession applicable to the estate of a re-united co-parener: D.B., xi, v, 10-11 and 38-39.

The above text of Vrihaspati is explained in the Dáyabhága Ch. xii., §§3-4, to curtail the operation of the rule of preference on account of re-union, by limiting it to the three sets of relations mentioned therein, namely, father and son, brothers, and uncle and nephew.

So that according to the Dáyabhága, if the claimants for inheritance be either two or more sons, or brothers, or paternal uncles, or fraternal nephews, and any one of each of these sets of heirs be re-united, then he is to be preferred to another of that set, who is not re-united. But if the deceased was re-united with any other relations than the four mentioned in Vrihaspati's text, then the legal incident of preference for re-union does not apply to them; such relations whether re-united or not, are entitled to succeed together.

The case-law—appears to modify the law of re-union as laid down in the Dáyabhága, by holding that the privilege extends to the sons of the brothers who became actually re-united: 1 Hyde, 214; 5 W.R., 249; 3 B.L.R., A.C.J., 7; I.L.R., 19 C., 634. In the last case Justice Ghosh examined all the passages of the Dáyabhága bearing on the subject of re-union; and the learned judge while holding that there cannot be a re-union between two agnatic first cousins so as to be attended with the legal incident of preference, thought himself constrained to follow the previous decisions and hold that the son of a re-united brother is entitled to preference to the son of a separated brother, although the former was not re-united in the legal sense.

But it should be remarked that if the separated brother had been alive, he would undoubtedly have succeeded in preference to the re-united brother's son; for, re-union gives preference, only when the claimants are of the same degree.

The previous decisions, however, appear to be overruled by the recent case of *Balabux* v. *Rukmabai*, (30 I.A., 130)

already noticed (p. 302), in which the Judicial Committee have enunciated the right view of the law of re-union.

Justice Mitra, however, has in a recent case got round this decision, and practically followed the current of decisions of the Calcutta High Court, noticed above, by holding that a nephew whose father was re-united and who was, in consequence, living, after his father's death, jointly with his father's re-united brother, was entitled to inherit his estate in preference to a separated nephew who was the son of his separated brother : *Akhay* v. *Hari*, I.L.R., 35 C., 721 = 12 W.N., 511.

The principle enunciated is, that a blind adherence to the doctrine of spiritual benefit is not reasonable, nor supported by the Dáyabhága itself; and that doctrine should not, therefore, be deemed to be the only guide for the decision of disputed questions even in the Bengal school : but propinquity, jointness, and natural love and affection, and the like principles consistent with natural justice should be considered and followed in deciding priority in the order of succession ; the Mitákshará also affords a guide and should be followed, where the Dáyabhága is silent.

CHAPTER VIII.

DAYABHAGA JOINT FAMILY.

The Mitakshara—is universally respected and accepted as of the highest and paramount authority, by all the schools except that of Bengal where it is received also as of high authority yielding only to the Dáyabhága in those points where they differ. The Mitákshará law should therefore be followed in Bengal where the Dáyabhága is silent.

Points of difference between Mitakshara and Dayabhaga.—The cardinal points of difference between the two schools are as follows :—

1. Heritage according to the Dáyabhága bears its proper sense and means property in which a person's right arises by reason only of his relationship to the former owner, *on the extinction of his right* by natural death, or civil death such as degradation from caste for the commission of a heinous sin, or renunciation, and retirement from worldly affairs by the adoption of a religious order : Ch. i, paras. 5, 31-34. See *ante* p. 58,

2. Right by birth is not admitted; hence, heritage is in all cases *obstructed*, and never *unobstructed*. See *ante* p. 199.

It should, however, be specially noticed that there is no difference at all between the two schools as to heirship which is founded on relationship only: whoever therefore is heir under the Mitákshará school must be heir also under the Dáyabhága school; the order of succession only being different to a slight extent. A blind adherence to the doctrine of spiritual benefit, introduced for the first time, by the founder of the Bengal school as one of the reasons, and a very strong one, put forward by him in support of the change in the *mode* and *order* of devolution of inheritance among the relations recognised as heirs by both the schools, has misled the judges of the Calcutta Hight Court in expressing an opinion as an *obitur dictum*, namely, that the sister's daughter's son is not an heir in the Bengal school upon the ground of his incapacity to confer spiritual benefit: (*Krishna* v. *Govt.*, 12 W.N., 453). The learned Judges failed to understand that the doctrine may be rightly held to be a key to the *order of succession*, but *not* to *inheritance*; for, if that were so, no *samanodaka* could succeed as heir in the Bengal school.

3. Two or more persons jointly inheriting property become tenants-in-common, and not joint-tenants in any case; *ante* p. 59.

4. The Dáyabhága doctrine of the co-heirs' tenure of joint heritage is, that each co-parcener's right extends to a fractional portion only of the inherited property, in other words, to that fractional share which should be allotted to him if there were an immediate partition made. Hence it differs from that of the Mitákshará, according to which the right of each co-heir extends to the whole of the property: D.B., Ch. I, para. 7.

5. The legal incidents deduced from this doctrine are, that a co-sharer can alienate his share without the consent of the rest, (D.B., ii, 27), and that survivorship cannot apply to the undivided share of a co-heir.

6. Partition accordingly means, manifesting or making known that unknown and unascertained fractional share, in which alone the heritable right of co-sharers arose when the succession fell in, and which was undetermined during the joint state; D.B., i, 8-9.

It should, however, be observed that *community of interest* is the common feature of joint families in both the schools. But in Bengal the titles of co-heirs being distinct, the mere definement of shares by numerical division would not amount to partition as under the Mitákshará, according to which coparceners have one common title; they are, therefore, deemed

joint-tenants in the one school, and *tenants-in-common* in the other. Hence ascertainment of shares that are well defined from the commencement of title, would not amount to partition under the Dáyabhága, the real test being the cessation of the community of interest : intention to separate must otherwise be proved : *Bata* v. *Gopal*, 5 L. J., 417.

7. As regards ancestral property, a son does not acquire an equal right during the father's life, so as to compel the father to make a partition of it against his will : D.B., ii, 8. Partition of ancestral property can take place during the father's life only by his desire, and after the mother is past child-bearing : D.B., ii, 7. On partition of ancestral property the father is entitled to two shares, and not to a share equal to that of a son as under the Mitákshará ; but he cannot claim more than a double share : D.B., ii, 20, 35-73.

But the father cannot alienate ancestral immoveable property (D.B., ii, 23), excepting a small part (D.B., ii, 24), nor a corrody (D.B., ii, 25). He is competent to alienate the ancestral immoveable property only for the support of the family and not otherwise : D.B., ii, 26.

Nor can the father make an unequal distribution of the ancestral property among his sons : D.B., ii, 76.

The father's estate in the ancestral immoveable property, therefore, is similar to the widow's estate in the husband's property.

Although a son cannot demand partition of the ancestral property as against the father, he is certainly entitled to maintenance out of the same : D.B., ii, 23.

8. The father making a partition of the ancestral property during his life is entitled to a moiety of a son's self-acquired property, and to two shares of any property acquired by a son with slight aid from the family funds, but principally through his personal exertion, that son getting two shares and the rest one share each ; D.B., ii, 65-72.

9. The father may make an unequal distribution of his self-acquired property among his sons, and retain as much as he chooses of such property, but not of ancestral property : D.B., ii, 74-76.

Dayabhaga law changed, how?—While dealing with the texts (see *supra* p. 182 & *infra* pp. 308-310) upon the authority of which the Mitákshará maintains the co-equal right of father and son in ancestral property, Jímútaváhana says that the intention of those texts is not to declare father

and son joint owners so as to make their shares equal on partition, or to entitle a son to acquire equal right to ancestral property during the father's life so as to enforce a partition against the father's will; but the intention is that a grandson becomes entitled to a predeceased son's right, and that the father is not entitled to make an unequal distribution of such property among his sons, nor to alienate ancestral immoveable property except for the support of the family; and although he maintains that the father is entitled to two shares out of the ancestral property, if a partition be made by him; yet he admits that he is not entitled to take more than a double share out of the ancestral property.

From what he says it is clear that the father is not absolute owner of the ancestral immoveable property: he is not entitled to take more than a double share on partition, and in other respects his right therein resembles the right of the Hindu widow in the husband's estate. It is also clear that the sons and their wives and children are entitled to maintenance from the ancestral property which is declared the hereditary source of the maintenance of male descendants and their family, and therefore inalienable except for their maintenance: D.B,, ii, 22-26.

Jímútaváhana then controverts the Mitákshará doctrine of incapacity of a co-parcener to alienate his undivided share without the consent of the other members of the joint family, and maintains that he is competent to deal with his share according to his pleasure without reference to his co-parceners, if he is otherwise authorized so to do: D.B., ii, 27. The text requiring the consent of co-sharers is, according to him, intended to prohibit transfers to a person of bad character, the introduction of whom as a co-sharer would put the other members of the family to difficulty; it is not intended to invalidate an alienation; D.B., ii, 28.

He then maintains that the father may transfer his self-acquired property in any way he pleases, without the concurrence of his sons, notwithstanding a text of law to the contrary, which must be construed to impose a moral duty, and not a legal restriction so as to invalidate an alienation actually made by the father; for, the nature of the father's absolute ownership in his self-acquired property,—or the capacity to deal with such property according to his pleasure, which is the legal incident of ownership,—cannot be altered by even a hundred texts like the one prohibiting alienation without the sons' consent: D.B., ii, 29-30.

Herein the author of the Dáyabhága is said to lay down the doctrine of *Factum valet*: see *supra*, p. 17.

By an improper extension of this doctrine of *Factum valet* our courts of justice have come to the conclusion that the father is the absolute owner of the ancestral property, so that there is no distinction between a father's self-acquired and ancestral property as regards his right of disposing of the same either by an act *inter vivos* or by a will, and that a son has no right except that of maintenance: *Tagore* v. *Tagore*, 18 W.R., 359.

The process of reasoning by which this conclusion is arrived at, appears to be, that as the sons have no right to enforce partition of ancestral property, therefore they have no right to the property which is accordingly vested absolutely in the father; the father therefore is the owner of the property, and as such has the capacity to deal with the property according to his pleasure; and this capacity cannot be altered by the text restricting his power of alienation.

But this argument is fallacious; for it might as well be argued that a reversioner has no right to the property inherited from her husband by a Hindu widow during her life; the estate is absolutely vested in her, no part of it being vested in any body else; therefore she has the capacity to deal with it according to her pleasure; and this capacity cannot be altered by the texts restraining her from alienating the same.

The two cases are exactly parallel; there is no difference between them in principle; and the error has been induced by not bearing in mind the broad distinction between self-acquired property and inherited property; in the latter case the nature of the right taken by an heir is defined and limited by the passages of the law of inheritance conferring such right. As regards the ownership of self-acquired property, its nature and character can by no means be affected by the existence or non-existence of a son. But as regards inherited property, the restrictions and limitations on the father's power of disposal are of the same character as those imposed on the widow.

The texts on ancestral property—cited in the second chapter of the Dáyabhága in which *ancestral* property is dealt with, and the author's explanatory comments on them show that the father takes only a qualified and not an absolute estate in the same. They are as follows,—

१। भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा। तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि॥

1. "Whatever land is acquired by the father's father, or a corrody or a chattel: therein the ownership of father and son is same."—Yájnavalkya.

The author of the Dáyabhága after having endeavoured to explain away this text, interprets it to intend that the father is not entitled to make an unequal distribution of ancestral property, as he can of his self-acquired property (D. B, ii, 9 and 15), as appears from the following text of Vishnu,—

२। पिता चेत् पुत्रान् विभजेत् तस्य स्वेच्छा स्वयमुपात्तेऽर्थे, पैतामहे तु पितापुत्रयोः तुल्यं स्वामित्वं ॥

2. "If a father separates his sons from himself, his own will (regulates the distribution) in (respect of) his self-acquired property; but in the property inherited from the father's father, the ownership of father and son is equal."

The author is constrained to admit that a father has no right to make an unequal distribution of such property, among his sons, because the ownership of father and son is equal. All that he maintains is, that these texts cannot be so construed as to mean that the father is entitled to the same share as a son, or that a son can enforce partition against his will: D.B., ii, 16 and 17.

३। मणिमुक्ताप्रवालानां सर्व्वस्यैव पिता प्रभुः। स्थावरस्य समस्तस्य न पिता न पितामहः ॥

3. ' Of the gems, pearls and corals the father is master of even all; but of the entire immoveable property neither the father nor the father's father is so."—Yájnavalkya.

The author says that this text refers to *ancestral* property; as the father's father is mentioned.

The author maintains that according to this text, a father is *incompetent to alienate* immoveable property, excepting a small portion provided that such alienation is not incompatible with the maintenance of the family; the prohibition applies also to a corrody and a slave; but he can alienate the whole property, if the family cannot be supported without so doing: D.B., ii, 22-26.

Then the author maintains that when a person is otherwise legally competent to alienate, as for legal necessity affecting the family when the property is ancestral; and according to his pleasure when it is his self-acquired, the texts requiring consent of the co-parceners in the former case, and of the sons in the latter, should be held to impose only a moral obligation, but not to invalidate an alienation actually made without such consent; because *the nature of a thing cannot be altered by a hundred such texts,* as those requiring consent of other persons: by "thing" is meant capacity to alienate: D.B., ii, 27-31.

४। जीवद्-विभागे तु पिता गृह्णीतांशद्वयं स्वयं। वृहस्पतिः।

द्वावंशौ प्रतिपद्येत विभजन्नात्मनः पिता। नारदः।

4. "But at a partition made in his lifetime, the father may take a couple of shares:—(Vrihaspati). "The father making a partition may set apart two shares for himself:"—Nárada.

The author cites these texts to support his position that the father is entitled to a double share out of the *ancestral* property, if he chooses to separate himself from his sons: D.B., ii, 35.

The author then goes on adducing arguments in support of his position that the father is entitled to a double share not only out of the ancestral property,—(D.B, ii, 36-64) but also out of a son's property acquired with the aid of family funds. And he maintains that a father is entitled to a moiety of a son's self-acquired property without such aid.

In the course of the argument the following text of Vrihaspati is cited,—

५। द्रव्ये पितामहोपात्ते स्थावरे जङ्गमे तथा। समम् स्वाम्यम् समाख्यातं पितुः पुत्रस्य चैव हि॥

5. "In property acquired by the paternal grandfather, immoveable likewise moveable, the parcenership of father and son is declared same:"—Vrihaspati.

The author says the meaning of this text is, not that the shares (of father and son) must be equal, but that the parcenership is same *i.e.*, equal, so *the father cannot make an unequal distribution at his pleasure* as in his self-acquired property: D.B., ii, 5).

Then the author again cites the above text of Vishnu (Text No. 2) and explains it thus,—

"The meaning of this text is,—"In the case of his self-acquired property whatever the father desires to reserve whether a moiety or two shares or three, all that is permitted to him by the law, *but not so also in the ancestral property.*" D.B., ii, 65.

After referring to other arguments (D.B., ii, 65-72) the author sets forth his conclusion thus,—

"Therefore the meaning of the texts is, that a father himself may take a double share of the property descended to him in the regular course of inheritance from the paternal ancestors, as well as of the property acquired by a son: he is *not entitled to more than two share even if desirous.* But of his self-acquired property he may take as much as he pleases."—D.B., ii, 73.

It is difficult to understand how after a perusal of the above passages of the Dáyabhága, specially the last, can it be reasonably said that there is no distinction between the ancestral and self-acquired properties in Bengal as regards the father's power of disposal over the same.

The author of the Dáyabhága, has, notwithstanding his endeavour to explain away the texts which declare equal ownership of father and son in ancestral property, and to indicate at one place that the ownership thereof is exclusively vested in the father, has, however, been constrained by reason of the above texts to admit some right of sons therein, by virtue of which the father's right is qualified, to such an extent that he can neither alienate nor make unequal distribution according to his pleasure, nor appropriate absolutely more than two shares. All this is abundantly clear from the above passages.

It is inexplicable how in 1831 long after the publication of Colebrooke's translation of the Dáyabhága the Judges of

the Sudder Dewany could return to the Supreme Court the following certificate,—

"On mature consideration of the points referred to us, we are unanimously of opinion that the only doctrine that can be held by the Sudder Dewany Adawlut, consistently with the decisions of the Court and the customs and usages of the people, is, that a Hindu, who has sons, can sell, give, or pledge without their consent, immoveable ancestral property, situated in the province of Bengal; and that without the consent of the sons, he can, by will prevent, alter or affect their succession to such property."—Mayne § 372.

We are not aware what evidence there was of the customs and usages of the people, referred to by the Judges. But the people of this country tenaciously adhere to their customs and usages, and they are still found to believe that there is a distinction between ancestral and self-acquired properties as regards father's power of alienation, such as is apparent from the Dáyabhága itself, and that it is conducive to the welfare and well-being of their society, notwithstanding the contrary view of the courts.

But you must bear in mind that the above view propounded by the Judges of the Sudder Dewany has since been accepted and followed, and is now the law on the subject in our Courts of Justice.

Hardship when old father merged in young wife.—Whatever may be the theoretical view of the father's and the son's right, practically there is no distinction between a Mitákshará and a Dáyabhága joint family as regards the actual enjoyment of the family property by sons. As a man cannot have a better friend than his own father, the above change of law does not prejudicially affect sons in Bengal in the majority of cases. But there are a few instances in which a great wrong is done to sons by fathers under the undue influence of their young wives, to prevent which the restriction on the father's power over ancestral property is imposed by Hindu law which our courts of justice ought to enforce in order to remedy the gross iniquity unjustly perpetrated by uxorious fathers on their innocent sons.

It is worthy of remark that whatever view of Hindu law may be taken by our Courts of justice, the people are governed by their old customs, habits and manners. It is a notorious fact that Hindus are still married by their fathers, at a time when they cannot, and do not, earn their own maintenance, and that the family property is looked upon as the hereditary source of maintenance of the sons and their wives and children. It sometimes happens that the first wife of a man dies after

presenting him several sons, the man then marries a girl of tender age, as grown up maidens are rare among Hindus. The children by the deceased wife look upon their stepmother with jealousy, and presuming upon the unusual affection naturally felt and shown by the father for his deceased wife's children, as he is to them both father and mother, they do sometimes ill-treat and even insult her, when she is young. This ill-treatment and insult make deep impression on her young mind, and she takes her revenge when she has by her charms of youth gained complete influence and ascendancy over her husband who must be considerably older than herself,—by alienating the heart of her husband from them, more especially if she has herself become mother of children. And all this ultimately results in a deed or a will whereby the sons by the deceased wife are either disinherited or cut off with a trifle. As this iniquity is the consequence of the erroneous view of the Dáyabhága law, our Courts of justice are called upon to remove the mischief introduced by them, which they may very easily and justly do, by setting aside the perpetration of the iniquity by declaring the transaction invalid on the ground of the same being in excess of the father's power over ancestral property, and also on the ground of undue influence, which is usually exercised by wives over husbands considerably older than themselves, and of which a typical instance is, according to popular notion, depicted by the great Hindu bard Válmiki in the well-known Rámáyana. The exile of Prince Ráma, the eldest and beloved son by the senior wife, to live in forests like an ascetic for a period of fourteen years, was ordered by his father, the King Dasaratha, at the instance of a junior wife, although his love for the prince was so great that he died of the grief of the separation from that prince who in obedience to his father's desire did piously and cheerfully leave the palace the instant he was informed of it, and went away for carrying it out as a filial duty. And the reason assigned for this extraordinary conduct of the king is imagined to be, that his love for the prince was *equal* to that of life, but he loved the prince's stepmother the younger queen *more* than his own life. This is embodied in the following popular maxim—

वृद्धस्य तरुणी भार्य्या प्राणेभ्योऽपि गरीयसी ।

which means,—"An old man's young wife is dearer to him than even his own life."

Although the prince's exile and the king's death were really

due to the king's high sense of moral obligation for the fulfilment of a promise which had been made by him to grant two requests of the queen as a reward for her valuable services during his illness, and present a high ideal of the sacredness of promises, yet the popular estimate of the king's conduct is the effect of what is usually observed in practice, namely, the pernicious influence of young wives over their old husbands.

If our Courts of justice do, having regard to the character of the people, take this undoubted undue influence as undue influence in the legal sense, they would certainly do justice in many hard cases owing their origin to a misapprehension of the law, which appears to have been caused by Colebrooke's mis-translation of some passages of the Dáyabhága, bearing on the subject : see Note at the end of this chapter.

Joint family in Bengal.—Although the joint family system which is the normal condition of Hindu society, prevails in Bengal in the same manner as in other provinces, and although the real difference between the two schools, with respect to ancestral property, is, that the author of the Dáyabhága, with a view to prevent the growth of disobedience in sons, deprived the sons of the right of enforcing partition against the father's will, and further provided two shares for the father in case *he* made a partition during his life, while at the same time the author deprived the father of the power of capriciously and whimsically doing any injustice to the sons by declaring him incompetent to alienate, or to make unequal distribution of, the ancestral property, or to take more than a double share on partition ; yet, according to the view taken by our Courts of justice with respect to ancestral property, there cannot be a real joint family consisting of father and sons during the father's life-time, inasmuch as joint property which is the essence of the conception of joint family, would be wanting to make them joint. Nor can there be, according to the modern view, a real partition during the father's life; for, it must now mean neither more nor less than a gift of the property by the father to his sons. See *Sarada* v. *Mahananda*, I.L.R., 31 C., 448.

So the position of affairs has become anomalous, owing to the divergence between actual practice and legal theory. But the evil consequences that might otherwise arise, are in the majority of instances prevented by the natural love and affection of a father for his sons, the regard to which appears to have induced the courts of justice to confer on fathers, rights not accorded to them by the commentaries on Hindu law.

But when a son acquires property with or without the aid of the family property, then a father and his sons may be joint as regards such property. For, the father is, according to the Dáyabhága, entitled to a moiety of his son's acquisitions even when made without any aid of the family property, and two shares of such property when acquired with the aid of his estate, the acquirer being entitled to two shares, and each of the other sons to one share: *Lal* v. *Swarna*, 13 W. N., 1133. The right of the other sons in the latter case is the same, whether partition is made during the lifetime of the father or after his death. The latter rule can be accounted for only on the assumption of son's interest in ancestral property of the family.

The father, however, must, if he wishes to take a share of his son's acquisitions, be willing to divide his property, if any, whether ancestral or self-acquired, according to the rules laid down in the Dáyabhága, which are now to be regarded as directory in other respects. It should be borne in mind that the question of shares arises only when there is disagreement, and in consequence disruption of the family by partition follows.

It is after the death of the father, that the sons may agreeably to the modern view of ancestral property, really become members of a joint family. According to the theory of the Bengal School they become tenants-in-common, and not joint-tenants, in respect of the estate inherited by them from their father; but still their interests remain common as long as the family continues joint, *community of interest* being the criterion of jointness in both the schools. The agreement forming the foundation of Re-union, proves the true nature and character of joint family property under the Bengal school notwithstanding the title of the co-heirs being in severalty, namely,—"What is thine is mine, and what is mine is thine."

As regards what constitutes joint property, the enjoyment of the same by the members, the management of the same, the manager's powers and the presumptions, the law appears generally to be the same in the Bengal School as under the Mitákshará. But see 31 C., 448, and 7 W.N., 725.

Joint acquisition and throwing into common stock.—There cannot be any doubt that joint families do exist in Bengal consisting of father and sons. The view taken by the courts, of ancestral property, which is contrary to the true intent of the Dáyabhága, has made it almost impossible that there should be a joint family of father and sons, unless they have joint

property acquired otherwise than by inheritance; although this view is contrary to the actual usages prevailing among the Hindus of Bengal. But the view taken in some recent cases by the Judges, of what is really either joint acquisition, or thrown into the common stock, under all the schools of Hindu law, is most anomalous and is likely to put an end to the joint family system in Bengal. A father purchases a piece of bare land by paying two hundred rupees as its price, one of the sons builds a house thereon apparently with the father's acquiesence, if not consent, at the expense of two thousand rupees out of his self-acquired money, and the house is treated and used as the joint family dwelling house of the father and all the sons: in these circumstances there cannot be any doubt that under the principles of Hindu law of joint families, the father as well as the sons would be entitled to the property, on the grounds of its being joint acquisition of the father and the son and of its being thrown into the common stock by reason of the enjoyment by all the members of the joint family as *their* family dwelling-house and joint property. The real test being the hopes and expectations raised by the conduct and treatment of the members by whom the property was acquired. But the learned judges decided the case as if it was one between strangers, without at all taking into consideration the law and usages of Hindus constituting a joint family: *Bijay* v. *Ashu*, 13 W.N., 396, purporting to follow *Dharmadas* v. *Amulya* I.L.R., 33 C., 1119 = 10 W.N., 765 = 3 L J., 616, which did not decide the question of title between the father and the son.

In the latter case what was held is, that a son building some rooms in the ancestral dwelling house with the father's consent, is not on that account entitled to reside in the house against the father's wishes when the peace of the family was disturbed by continuous family feuds caused by his two wives, which could be restored only by his leaving the house.

Partition.—Real partition may take place only after the father's death. It may take place at the instance of a single co-sharer (D.B., i, 35) who has an interest in the family property according to the rules of succession, that apply to all cases without any such distinction as there is, under the Mitákshará, based upon jointness, separation or re-union.

If the owner dies leaving male issue him surviving, then his son, a predeceased son's son, and a great-grandson whose father

and grandfather are both predeceased, are entitled to the estate and may claim a partition.

Partition amongst the male descendants is to be made *per stirpes*, and not *per capita*.

Maiden Sister.—When partition is made by sons after the death of their father, their maiden sister is not entitled to a quarter share as in the Mitákshará School, but only to maintenance until her marriage, and to the expenses of her marriage, which cannot exceed a quarter share where the property is small. See *ante* p. 270.

Mother's share.—When the sons left by a man are all full brothers, and their mother is alive, then if partition is made by them, she is entitled to a share equal to that of a son. The mother's share is liable to be reduced if she has received *stridhan* property from her husband or father-in-law, in the same way as under the Mitákshará. But if her *stridhan* so received exceeds what is receivable by her as her share, then she does not get any share, but retains her *stridhan*. But the step-mother, if any, is not entitled to any share, but to maintenance only. See *ante* p. 268.

A mother who has inherited the share of a son as his heir is nevertheless entitled to another share on partition by her surviving sons, at which she gets one share in her own right, and another as heiress of her deceased son: *Poorendra v. Sm. Hemangini*, I.L.R., 36 C., 75 = 12 W.N., 1002.

But if the husband by his will makes express gift of his estate to his sons in such a manner as to distribute his estate among the sons, and provide maintentance only to the mother of the sons, then the mother cannot claim a share on actual division of the estate by her sons. When, however, there is no express gift to the sons by the husband's Will which merely directs the executrix to divide the testator's properties among his sons in equal shares, the direction was not construed to operate as an *express gift*, but to intend postponement of partition until attainment by the youngest son of his 21st year: *Ibid* I.L.R., 36 C., 75 ; 12 C., 165 ; 15 C., 292 ; 17 C., 886.

Nature of mother's right in the share.—The share which the mother obtains appears to become her *stridhan*. The nature and extent of the mother's right in such share are not expressly stated in the Dáyabhága. But regard being had to the fact that her share may consist in part of her *stridhan*, and to the rule of the Hindu law that समं स्यात्, अश्रुतत्वात् विशेषस्य "Equality is the rule where no distinction is expressed," it appears to follow that

she has the same sort of right in it, as her sons have in their shares. She does undoubtedly acquire an interest in the share, and in the absence of any limitation, express or necessarily implied, the presumption is that such interest amounts to absolute ownership. The Mitákshará also supports this view. (*See supra* p. 269). Any other view must necessitate the introduction of principles and distinctions unknown to Hindu law, and create considerable difficulty. The property is not inherited by her, and there cannot therefore be a reversioner as regards it. The share again may fall short of her maintenance, and what should be her rights then? Is her interest a life-interest, or a widow's estate, or an absolute estate? There was no authoritative decision on the point. But there were *obiter dicta* in several cases, which appear to be against the mother's absolute right, and to introduce the estate of vested remainder in the sons.

The question has at last been settled by the decision of the High Court in the case of *Sorolah* v. *Bhubun*, I.L.R., 15 C., 292. The mother's right to the share has been held to be similar to the widow's estate; and as regards succession after the mother's death, to the share if not consumed by her, the sons from whom she received the same are declared to have a vested remainder, so that they or their legal representatives will get the share equally: so this is more anomalous than the *widow's estate*. See also *Tripura* v. *Dakshina*, 11 W.N., 698.

This is another instance in which women's right has unjustly been curtailed, by reason of a mistaken view of *woman's property*.

Father's mother's share.—The paternal grandmother is also entitled to a share at a partition by her grandsons; *Purna* v. *Sarojni*, I.L.R., 31 C., 1065: *ante* p. 270.

Maintenance of father's wives.—When the sons are not all full brothers, then on partition between them the father's wives are entitled only to maintenance, and not to any share. Their maintenance is a charge upon the whole estate. But it has been held by the Calcutta High Court and the Privy Council in the case of *Srimati Hemangini* v. *Kedar Nath*, I. L. R., 13 C., 336 = I.L.R., 16 C., 758 = 16 I.A., 115,—in which a person left three sons and one widow who was the mother of only one of these sons, and there was a partition suit between them ending in a decree,—that the widow's maintenance *after* partition becomes a charge on the share of her son, and does no longer remain so on the entire estate. This rule will operate with great hardship,

in cases where the property is not so large as it was in the case in which the above rule has been laid down.

Other persons entitled to maintenance.—There are some other persons that are entitled to maintenance, such as dependent members of the family. They will be mentioned later on in the Chapter on Maintenance.

NOTE.

I expressed surprise as to how the Sudder Dewany Judges could, after perusal of the second chapter of the Dáyabhága, give the certificate cited at p. 311 *supra*. But I now find that it owed its origin to Colebrooke's mis-translation of some passages such as the following—

तदेवमुक्तप्रबन्धेन यत्र ज्येष्ठभ्रातुरेव पितृधने भागद्वयं कथं तत्र जनकस्य दानविक्रयपरित्यागक्षमस्य पितामहधनसम्बन्धमूलस्य अतिगुरोः पितुरेव स्वपितृधने भागद्वयं न सम्भवति ॥ Dáyabhága, ii, 46—

of which the following is literal translation,—"Hence when thus by the aforesaid reasoning even the eldest brother is entitled to two shares of the father's estate (at a partition between brothers) why should not then the father—who is the progenitor (of his sons), who is competent to give, sell or abandon (his sons), who is the root of the (son's) connexion with the father's father's property, and who is (as such) highly venerable,—be entitled to two shares of his own father's wealth (at a partition between himself and his sons)?"

The words within the parentheses are not in the original.

The following is Colebrooke's translation of the above passage,—"By the reasoning thus set forth, if the elder brother have two shares of the father's estate, how should the highly venerable father being the natural parent *of the brothers*, and competent to sell, give or abandon *the property*, and being the root of all connexion with the grandfather's estate, be not entitled, in like circumstances, to a double portion of his own father's estate?"

The Italicized words are not in the original. The interpolation of the words "*the property*" is erroneous and renders the passage contradictory to what has been laid down by the author in the preceding paragraphs 20-26. In fact, the argument itself, put forward in the passage, would be ridiculous and a contradiction in terms, according to Colebrooke's translation: to say that the father can alienate the property according to his pleasure, and to argue that he is entitled to a double share, would be simply absurd. The author really means what is declared by Vasishtha in the text cited at p. 118 *ante*, namely, that the father is competent to give, sell or disown his sons, and not the ancestral property. By this erroneous translation, the Judges were misled into thinking that the father is competent to alienate ancestral property according to his pleasure, as is stated by them in the Certificate, a proposition not dreamed by the author of the Dáyabhága.

CHAPTER IX.

DA'YABHA'GA SUCCESSION.

In the Bengal School the order of succession is worked out mainly by the application of two principles, namely, (1) Propinquity, and (2) Capacity for conferring spiritual benefit (the relative amount of which is estimated in each case by the author of the Dáyabhága, himself): D.T., xi, 63.

The order of succession to the estate of a male,—according to the Dáyabhága of Jímútaváhana, as supplemented by the Dáyatattva of Raghunandana, and as explained in Srikrishna's commentary on the Dáyabhága, and also in his treatise on the order of succession called Dáya-Krama-Sangraha (omitting therefrom the interpolated passages not found in all copies) and according to the traditional interpretation of the Dáyabhága which alone is regarded by the people of Bengal as the authority by which they are governed in matters of inheritance,—is as follows :—

1-3. Son, grandson, and great-grandson in the same manner as under the Mitákshará, see *supra* p. 285.

4. Widow, 5. daughter (1) first **maiden** (2) and then **married and having or likely to have male issue,** a widowed sonless daughter, a barren daughter, and a daughter who gives birth to female children only, are excluded from inheritance; **6. Daughter's son.**

The widow's estate is the same as has already been explained under the Mitákshará, (*supra* p. 286). It has been held that an unchaste daughter is, according to the Dáyabhága, excluded from inheritance : I.L.R., 22 C., 347. But see *contra, supra* p. 287. Daughter's sons take *per capita*, and not *per stirpes*.

Having regard to what is stated by the author of the Dáyabhága with respect to the succession of the widowed sonless and the like daughters to the mother's *Stridhan* property, the exclusion of the said daughters from the inheritance of the father's estate does not appear to be absolute, but only relative, and accordingly such daughters should be placed after the daughter's son, following the analogy of the order of succession to *Stridhan*.

7. Father, 8. Mother, 9. Brother, 10. Brother's son, 11. Brother's son's son, 12. Father's daughter's son.

It has been held that an unchaste mother is excluded from inheritance: I.L.R., 4 C., 550. But see *contra, supra* p. 287. A full-brother is entitled to take, to the exclusion of a half-

brother; and this distinction applies to all collaterals such as the brother's son, paternal uncle and the like. But it has been held that the half-sister's son is entitled to take together with the full-sister's son,—the capacity for spiritual benefit being assumed as the sole test: I.L.R., 11 C., 69. But see Srikrishna's Recapitulation *infra* p. 331.

It has been held that a brother's son whose father was re-united with his uncle, and who used to live jointly with his uncle after his father's death, but who himself cannot be deemed re-united—is nevertheless entitled to inherit from the uncle in preference to a separated nephew: I.L.R., 35 C., 721.

13. Paternal grandfather, 14. Paternal grandmother, 15. Paternal uncle, 16. Paternal uncle's son, 17. Paternal uncle's son's son, 18. Paternal grandfather's daughter's son.

19. Paternal great-grandfather, 20. Paternal great-grandmother, 21. Paternal granduncle, 22. His son, 23. His son's son, 24. Paternal great-grandfather's daughter's son.

1ST NOTE.—The Dáyabhága law of succession has been modified by judicial decisions, and the following eight cognates have (for the present) been shuffled in here before the maternal relations, namely, (1) son's daughter's son, (2) grandson's daughter's son, (3) brother's daughter's son, (4) nephew's daughter's son, (5) paternal uncle's daughter's son, (6) paternal uncle's son's daughter's son, (7) paternal granduncle's daughter's son, and (8) the granduncle's son's daughter's son. But this should be taken as the present law. The following near maternal relations are dearer to the Hindus than these that used to be thought no heirs at all

25. Maternal grandfather, 26. Maternal uncle, 27. Maternal uncle's son, 28. Maternal uncle's son's son, 29. Mother's sister's son.

2ND NOTE.—Consistently with the above modification under the judicial decisions the following reciprocal maternal relations are to be placed here, namely, (1) the maternal great-grandfather, (2) his son, (3) grandson, (4) great-grandson, 5) and daughter's son, (6) maternal great-great-grandfather, (7) his son, (8) grandson, (9) great-grandson, (10) and daughter's son, and probably also (11-16) grandsons by daughter, of the son and the grandson of the three maternal ancestors. To postpone the Sakulyas to these too remote maternal relations, however, would be repugnant to the feelings of the Hindus, and also erroneous.

30-62. Sakulyas,—they include the 4th, 5th, and 6th descendants in the male line, if any, of the *propositus* himself, and of his father, paternal grandfather and paternal great-grandfather; and they also include the three remoter paternal ancestors in the male line, namely, the paternal great-grandfather's father, grandfather and great-grandfather, and also six descendants in the male line, of each of these ancestors,—altogether thirty-three relations.

The order of succession amongst the Sakulyas appears to be that the descendants of the *propositus* come first, and then the descendants of his father, and then those of the next nearest paternal ancestor, and so on; and that amongst the descendants of the same ancestor, the nearest in degree takes in preference to the more remote.

63-208. Samanodakas.—They are the same as under the Mitáksharà: see *supra* p. 291.

The remaining Bandhus—such as the eight daughter's sons, and the seventeen maternal relations set forth in the two Notes, as well as the father's and the mother's maternal relations, and so forth, in the same manner as under the Mitáksharà; then

Preceptor of the Vedas, Pupil, and Fellow-student in their order—then

Distant sagotras of the same village,—then

Samana-pravaras of the same village,—then

Brahmanas of the same village,—lastly

The King—is the *ultima hæres*, but not of the estate of a Bráhmana, which goes to the members of his caste.

Heirs under Mitakshara and Dayabhaga.—There is no difference between the two schools as to the persons that are heirs. To the question who are heirs? the answer is the same in both the schools, namely, relations, agnate and cognate, are heirs. But there is some difference as to the *order of succession.*

The term *gotraja* in Yájnavalkya's text (*supra* p. 282) is, according to the Mitáksharà, equivalent to *sagotra* or a member of the same *gotra* with the *propositus*. But the Dáyabhága explains the word to include cognates descended from a member of the *gotra*, such as the daughter's son, the sister's son, the father's sister's son, and so forth. And the word *Bandhu* which, according to the Mitáksharà, signifies all cognates, is restricted by the Dáyabhága to cognate relations connected through the mother, the father's mother, and so forth. Thus Jímútaváhana controverts the interpretation put on the texts of Yájnavalkya (*supra* p. 282) by the Mitáksharà which postpones all cognates save and except the daughter's son, to agnates comprised by the terms *sapinda* and *samánodaka.*

The author of the Dáyabhága follows the analogy of the succession of the descendants of the *propositus* himself, in working out the order of succession among the three paternal ancestor's descendants, and introduces their great-grandson in the male line and their daughter's son, just after their son's

son respectively. Thus, in addition to the daughter's son of the *propositus*, three other cognates are introduced, namely the son of the daughter of the father, of the grandfather, and of the great-grandfather. And then reciprocally to these four cognate descendants of the family, four maternal relations are intended to be introduced by the author of the Dáyabhága, namely,

Maternal grandfather reciprocally to daughter's son,
Maternal uncle reciprocally to sister's son,
Maternal uncle's son reciprocally to father's sister's son, and
Said uncle's son's son reciprocally to grandfather's sister's son.

It should be observed that the maternal uncle and his son, and his son's son are the maternal relations who confer the greatest amount of spiritual benefit on the three maternal ancestors of the deceased, to whom he is said to be bound to offer *pindas*. But nevertheless the maternal grandfather must be placed before them; for, it is through him that they are related to the deceased, and they cannot confer any spiritual benefit so long as he is alive. The mother's sister's son may also be placed here by reason of his conferring special spiritual benefit on the maternal grandfather.

Subject to this modification, the author of the Dáyabhága intended to leave the order of succession such as it is according to the Mitákshará which also is respected by the Bengal School as of high authority.

From a perusal of the sixth section of the XI, Chapter of the Dayabhaga it would appear that it was not the intention of the author to deal so much with the distant succession as with the changes introduced by him. He simply touches upon the distant succession in a few paragraphs 2 and 27 parenthetically, and then returns to the changes which he introduced and which appear to engross his mind. This accounts for the incompleteness of the distant succession, his difficiency being supplied by his follower Raghunandana who is, next to him, the highest authority in Bengal.

Dayabhaga order of succession misunderstood.—A question arose for the consideration of a Full Bench of the Calcutta High Court, whether a brother's daughter's son or the father's brother's daughter's son is an heir at all according to the Bengal School.

There was another question in that case, namely, if he is an heir, what is his position in the order of succession? As regards this latter question, an erroneous admission was made before the Division Bench by the learned pleader of the oppo-

site party, namely, that if they were recognised as heirs their position would be before the *Sakulya* relations. The Dáyatattva of Raghunandana was not then translated into English, and so it was not noticed that the same position is assigned by that treatise to all cognates other than the eight mentioned above, as they hold under the Mitákshará, and that therefore the position of those cognates in the order of succession is exactly the same as under the Mitákshará.

Doctrine of spiritual benefit no test of heirship.—At one time it was supposed that the doctrine of spiritual benefit is the key to the Hindu law of inheritance. It is, however, now admitted on all hands that the doctrine is not recognized by the Mitákshará School, that is to say, by the majority of the Hindus. In the Bengal School also, the doctrine was for the first time introduced and relied on by Jímútaváhana as a corroborative argument in support of his expositions of the texts of law relating to the order of succession. It is in fact a pretext by which he fortifies his argument in support of the changes made by him in the order of succession, by the introduction of some near and dear cognates in preference to more distant agnates; it has nothing whatever to do with the question as to who are heirs; for, as to that, both the schools are at one, and give the same answer, namely, the relations are heirs. The very definition of *heritage* clearly implies the same thing.

Propinquity, or proximity of birth, is the principle of the order of succession, according to the Mitákshará, This is admitted also by the Bengal School, but the capacity for spiritual benefit is also taken into consideration along with it: D.T., xi, § 63. Cited in *Toolsee* v. *Sm. Lucky*, 4 W.N., 743, 746; and approved in *Akshoy* v. *Hari*, I.L.R., 35 C., 721, 726.

Object of Dayabhaga, and the doctrine, misunderstood.—According to its traditional interpretation, the Dáyabhága was all along understood to lay down a particular well-known order of succession. And this is clear not only from the order expounded by the Dáyabhága, but also from the author's express statement: see Ch. xi, vi, 30. Its object was not to lay down the so-called principle of spiritual benefit, and to leave the order of succession uncertain and unsettled. But Justice D. N. Mitter who was ignorant of Sanskrit, and therefore had no access to the original works on Hindu law, put a novel construction on the Dáyabhága, which is different

from, and opposed to, its traditional interpretation. That eminent judge imagined that the object of the Dáyabhága was not to lay down an order of succession, but to lay down the principle of spiritual benefit, from which the order of succession is to be worked out. That this view is inconsistent with the Dáyabhága, and therefore unworthy of acceptance, is established by the following passage in the concluding portion of the judgment delivered by him in **Guru Gobind Shaha Mundal's case,** 5 B.L.R. 15 = 13 W.R., F.B., 49:—

"Lastly it has been urged that the precise position which the son of a paternal uncle's daughter would be entitled to hold according to the principle of spiritual benefit, would interfere with that which has been assigned by the author of the Dáyabhága to some of the heirs specified in the earlier part (Sections 1–5) of Chapter XI. * * * But this circumstance, even if true, cannot be accepted as a sufficient reason to justify the total exclusion of one single heir who is competent to satisfy all the requirements of that principle. If in any case which may arise hereafter, it should become necessary for us to determine the precise position which the son of a paternal uncle's daughter is entitled to hold in the order of succession, the question would fairly arise, namely, *whether the details of a work like the Dáyabhága ought to be permitted to override the principle upon which it is admittedly based.*"

This passage shows that the principle of spiritual benefit as explained in the above judgment, is inconsistent with and opposed to the details of the order of succession among certain heirs, worked out and expressed in the clearest possible language, by the author of the Dáyabhága, himself.

The interpretation put on the Dáyábhága, by assuming that its acute logical author did not understand the principle which is taken to be enunciated by himself, is one which is opposed to all canons of construction, and is inconsistent with the traditional exposition given by learned Pandits, of the views maintained by the founder of the Bengal School, and contained in that treatise which is accepted by the people of Bengal as the book of paramount authority on inheritance.

The learned Pandits who are the repositories of the traditional interpretation of the Dáyabhága hold that the doctrine of spiritual benefit is put forward by Jímútaváhana merely as a corroborative argument in support of the *order of succession* which he maintains as the one intended to be laid down by the sages in the Smritis.

Proper mode of reading Mitakshara and Dayabhaga.—The proper mode in which our Courts of Justice are to read these Commentaries, is to ascertain the conclusions drawn by their authors. The reasons assigned by the authors for their conclusions may be good, bad or indifferent; and the duty of a Judge is not so much to inquire whether a disputed doctrine is fairly deducible from earliest authorities, namely the texts of the Codes, as to ascertain whether it has been received by the particular school and has been sanctioned by usage (12 M.I.A., 397). The Lords of the Judicial Committee have in a subsequent case pointed out the manner in which these works are to be read, thus,—

"But even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Catyayana's text by itself, as what are the conclusions which the author of Dáyabhága has himself drawn from them":—*Moniram* v. *Keri*, 5 C., 776, 785=7 I.A., 115, 150.

The *order of succession* laid down by the author of the Dáyabhága embodies the conclusions drawn by the author himself from the texts and from the doctrine of spiritual benefit, and it is not open to the Courts to consider what inferences *they* can draw from the words of texts, and from the arguments put forward by the author in justifying his own conclusions,—and to lay down an altogether different order.

Hence the mode of construction adopted by the above Full Bench is such as is pronounced by the Privy Council to be improper and unreasonable.

The author of the Dáyabhága used the vague expression "Maternal uncle and the rest" who are to inherit after the paternal great-grandfather's descendants inclusive of his daughter's son: Ch. xi, vi, 12 and 20. This has been explained in the Dáyatattva (ch. xi, §§ 69-71) by Raghunandana who says that the maternal grandfather must come before the maternal uncle: and by Srikrishna in his commentary on the Dáyabhága, who says that "Maternal uncle and the rest," includes his son and grandson. And this is also the traditional interpretation of the Dáyabhága.

Raghunandana and Srikrishna.—Raghunandana is the author of the Smriti-tattva also called Ashtávinsati-Tattva, or twenty eight subjects or books, one of which is the Dáyatattva or Subject of Inheritance which is thus noticed by Colebrooke

in the preface to his translation of the Mitákshará and the Dáyabhága :—

"The Dáyatattva or so much of the Smriti-tattva as relates to inheritance, is the undoubted composition of Raghunandana, and in deference to the greatness of the author's name and the estimation in which his works are held among the learned Hindus of Bengal, has been throughout diligently consulted and carefully compared with Jímútaváhana's treatise, on which it is almost exclusively founded. It is indeed an excellent compendium of the law, in which not only Jímútaváhana's doctrines are in general strictly followed, but are commonly delivered in his own words in brief extracts from his text. On a few points, however, Raghunandana has differed from his master; *and in some instances he has supplied deficiencies.*"

Raghunandana introduces after the Samánodakas the remaining *Bandhus*, *i.e.*, those other than the eight to whom a preferable position has been assigned by Jímútaváhana, (Dáyatattva Ch., vi, §§ 62 and 72); he cites the same texts (see *supra* p. 283) enumerating nine cognates as Bandhus, which are cited in the Mitákshará, and thus he supplies an apparent deficiency of the Dáyabhága. But it was not translated into English when the Full Bench had to consider whether the father's brother's daughter's son is an heir or not, according to the Bengal School, and it does not appear to have been brought to the notice of the Judges.

Srikrishna is a commentator of the Dáyabhága and is also the author of the Dáyakrama-Sangraha a treatise on the order of succession. Of him, Colebrooke speaks as follows in the aforesaid preface :—

"The commentary of Srikrishna Tarcálancára on the Dáyabhága of Jímútaváhana has been chiefly and preferably used. This is the most celebrated of the glosses on the text. It is the work of a very acute logician, who interprets his author and reasons on his argument with great accuracy and precision. * * * (It is) ranked in general estimation after the treatises of Jímútaváhana and of Raghunandana.

"An original treatise by the same author, entitled Dáyacrama-Sangraha, contains a good compendium of the law of inheritance according to Jímútaváhana's text as expounded in his commentary."

But this latter remark would be correct if the passages which are not found in all copies of the Dáyakrama-Sangraha, but which have been incorporated in its English translation, be

omitted as being spurious interpolations. These passages are those which relate to the succession of the brother's daughter's son and the like, and those which relate to the succession of the maternal great-grandfather and great-great-grandfather and their descendants: the former are not at all noticed by Colebrooke in his annotation at the end of Chapter XI of the Dáyabhága,—a circumstance which shows that those passages were not in the copies of the work in his possession, (W.R., special No., 176; 23 W.R., 117); and the latter passages are noticed in the annotation by Colebrooke, but he says that these were wanting in some copies of the work— a fact proving them to be interpolations. For, had these passages been genuine, the views therein expressed would undoubtedly have been mentioned by Sríkrishna in his Commentary on the Dáyabhága.

It is worthy of special remark that neither Raghunandana nor Sríkrishna nor the five other commentators of the Dáya-bhága did understand that treatise as laying down the principle of spiritual benefit such as is expounded in the judgment of Justice Dwarka Nath Mitter.

When there is a conflict between the Dáyabhága on the one hand, and the other writers of the Bengal School on the other, the former must be followed. The latter cannot override the former, but are accepted as mere commentaries on the same, and as such are authoritative only on points on which the Dáyabhága is silent.

Dayatattva misunderstood.—The Dáyatattva does not at all support the view taken by the Full Bench, of the principle of spiritual benefit. But nevertheless a very learned lawyer contended before a Division Bench of the Calcutta High Court that the Dáyatattva supported his contention, namely, that a brother's daughter's son in entitled to preference to a great-grandson of the paternal grandfather (15 C., 780), and went to the length of asserting that "in the translation (of the Dáyatattva), para. 64 is somewhat different from the original." This is an instance showing how even the well-regulated mind of an advocate may be betrayed into error by taking an onesided view of a question; for no real Sanskritist could call the correctness of the translation in question. The original passage runs as follows :—

तत्र यथा दौहित्रान्त-स्व-सन्तानाभावे भ्राता अधिकारी, एवं भ्रातृ-पुत्राभावे तद्दौहित्रान्तः पितुः सन्तानः अधिकारी ।

and the translation is as follows :—

"Accordingly, as on failure of the deceased proprietor's lineage including his daughter's son, others succeed, similarly in default of the brother's son, the father's lineage ending with his daughter's son, takes the heritage."—D.T., xi, 6 § 64.

It should be observed that the conjoint or compound word तद्दौहित्रान्तः "ending-with-his-daughter's-son" is an adjective qualifying the term पितृ सन्तानः "the father's lineage," in the original the former word stands first and then the term "the father's lineage," so that if the words be placed in the same order in which they stand in the original, the last sentence would stand thus,—

"Similarly in default of the brother's son, ending-with-his-daughter's-son the father's lineage takes the heritage."

And then the question arises to what word does the pronoun "*his*" in the compound adjective term "ending-with-*his*-daughter's-son" relate,—to the word brother, or his son, or to the father, or his lineage?

The contention which appears to have been raised before the Court, was, that it relates to the word "brother" or "brother's son." This contention would have been plausible, if the pronoun "his" had not been a component part of a compound word qualifying the term "the father's lineage"; for, as it stands it cannot but relate to the principal word "father's" according to the grammatical rule of construction.

If you now turn to the logical rule of construction, then having regard to the context, there cannot be the slightest doubt on the mind of a reader as to the person to whom the pronoun "his" relates.

In order to understand the true meaning of the passage, it is necessary to understand what is really intended to be expressed by it; and for the purpose of understanding the same, what is laid down in Yájnavalkya's text on succession, and the exposition of the same as given in the Mitákshará, should be taken into consideration.

The text of Yájnavalkya, lays down the order of succession down to the brother's son, thus—

"The widow, the daughters also, both parents, brothers likewise, their sons, gentiles, &c.," *supra* p. 282.

It should be borne in mind that the order of succession down to the brother's son as laid down in this text, has been adopted with the addition of daughter's son after daughter, by both the schools. It is after the brother's son that the

orders differ in the two schools: the Mitákshará maintains that after him the paternal grandmother and the like succeed; but the Dáyabhága, following the analogy of the descendants of the *propositus* himself, introduces the brother's grandson and the sister's son after the brother's son and before the paternal grandparents. And the above passage of the Dáyatattva embodies this view of the Dáyabhága school: the principal words in the proposition are, the deceased proprietor and his father,—the words "brother's son" being but words of secondary importance; he is enumerated in Yájnavalkya's text, as an heir, and so his default is mentioned in the above passage, as the question arises, Who is to take in his default? see Dáyatattva ch. xi, § 60. And the answer given by the above passage is, that the father's descendants shall succeed like the descendants of the *propositus* himself, ending with his daughter's son, or in other words, the father's great-grandson and daughter's son, succeed in their order after the brother's son. Had the sons of the daughters of the *propositus's* son and grandson been enumerated in the Dáyatattva as heirs taking before the parents, then and then only could it have been put forward with reason, that the pronoun "his" in the above compound word, relates to the "brother" or "brother's son."

Hence it is clear that the assertion made before the court impugning the accuracy of the translation is erroneous and unjustifiable.

And the learned Judges of the High Court were not justified in attaching the importance they did, to the *ipse dixit* of the pleader who made the bold assertion.

Raghunandana on order of succession.—Raghunandana's Dáyatattwa supports the traditional interpretation of the Dáyabhága, and not the view taken by the Full Bench, that is to say, it lays down clearly an order of succession, supplying the deficiencies of the Dáyabhága. He says that the order of succession is to be determined by the application of two principles, thus—

"Therefore a successor to the inheritance is to be determined by reference to two considerations, namely, his comparative capacity as regards the offering of oblations, and his proximity of birth."—xi, 63.

And then he goes on to work out the order according to those principles after the *brother's son* (down to whom the order is ordained by both Vishnu and Yájnavalkya, p. 282) in the following passages reproducing Jímútaváhana's views,—

"Accordingly, as on failure of the deceased proprietor's own lineage down to the daughter's son, others succeed similarly in default of the brother's son, the father's lineage ending with his daughter's son takes the heritage. D.T., xi, 64.

In their default, the grandfather succeeds. D.T., xi, 65.

On failure of him, the grandmother inherits. * * * D.T., xi, 66.

In her default, the descendants of the paternal grandfather, down to his daughter's son, succeed in the same way, as has been seen with regard to the father's issue. D.T., xi 67.

On the same principle, the paternal great-grandfather, the paternal great-grandmother, and the descendants of the paternal great-grandfather, down to his daughter's son, (succeed in the same order). D.T., xi, 68.

On failure of (these) givers of oblations partaken of by the deceased (proprietor,) the 'cognates' (§ 2) such as the maternal grandfather, the maternal uncle and the like,—are entitled to the inheritance. D.T., xi, 69.

Among these too, if the maternal grandfather survives, he alone succeeds, in the same way as the father and the like. D.T. xi, 70.

If he be dead, then the maternal uncle and the like become heirs in the same order, since they present oblations to the maternal grandfather and the like, which the deceased (proprietor) was bound to offer. D.T., xi, 71.

On their default the 'Sakulyas' or the kinsmen of divided oblations become heirs." D.T., xi, 72.

On perusal of these passages in the original no Sanskritist Lawyer can have any doubt that the eight cognates beginning with the son's daughter's son and the seventeen maternal relations enumerated respectively in the 1st and the 2nd Note p. 386 cannot be introduced before the *sakulyas*. Although there is no word in the original corresponding to the word "these" put within parenthesis in § 69, still it is necessarily implied by the context; and the only maternal relations expressed and necessarily implied by the words "in the same way as the father and the like" in § 70 and "in the same order" in § 71, are, the maternal grandfather, his son, grandson, and great-grandson, and (it may be conceded) also his daughter's son or the mother sister's son, the analogy referred to being in his favour.

But it should be specially noticed that these maternal relations are introduced here because they confer spiritual benefit on those to whom the deceased proprietor was bound to offer, but not on the deceased himself. On this ground, only those that confer the highest amount of benefit on the three maternal ancestors beginning with the maternal grandfather may be brought in: they are his three male descendants beginning with the maternal uncle, and his daughter's son. By the application of the principle of propinquity, the maternal grandfather is, like the father and his father and grandfather, placed before his three male issue.

You should bear in mind that according to the principle of propinquity alone, which is the only principle followed in the Mitákshará, all cognates are postponed to agnates. Hence by the application of that principle as well as that of spiritual benefit, those cognates only can be placed before the agnates, that are *sure* to confer a *higher* amount of spiritual benefit; accordingly, no other cognate than the eight stated above can be preferred to agnates, except perhaps the mother's sister's son who may be said to be implied by the analogy.

It has already been noticed that the Dáyatattva assigns to the other cognates the same position as they have under the Mitákshará. Had that fact been known, there would have been no question for reference to the Full Bench.

Recapitulation of Dayabhaga heirs in their order, by Srikrishna—in his Commentary on the Dáyabhága, as given by Colebrooke in his translation, is inconsistent with the Dáyabhága as well as with Srikrishna's comments thereon. It is difficult to account for this error, except by assuming either that Colebrooke's copy of the work was inaccurate, or that the inaccuracies themselves have crept in somehow without Colebrooke's knowledge. The latter alternative is the only assumption that can reasonably be made; for, otherwise it is impossible to explain how such glaring inconsistencies could fail to attract the attention of so careful and learned a translator as Colebrooke. The following is the rendering of Srikrishna's Recapitulation which is given in the edition of the original Dáyabhága with its six commentaries, by Pandit Bharat-Chandra Siromani at p. 342 : —

RECAPITULATION.

"The following is the order of successors to the estate of a deceased male according to this (*i.e.*, Dáyabhága):—(1) First, **son**; (2) in his default, **son's son**; (3) in his default, **son's son's son,**—a grandson by a predeceased son and a great-grandson whose father and grandfather are both predeceased, succeed jointly with a son; (4) in default of male issue down to the great-grandson, **widow,**—having succeeded to the husband's estate she should live with the family of her husband or in their default with the family of her father, and enjoy her husband's heritage for preserving her body, she should likewise make gifts and the like, of a small portion of the property, for the benefit of her husband's soul, but must not alienate it according to pleasure like her Strídhan; (5) in her default, **daughters,** amongst them, first, **maiden,** in her default, **betrothed,** on failure of her, **married,** of married daughters, she who has a son, and she who is likely to have a son are entitled to succeed jointly, but a barren daughter and a sonless widowed daughter are not entitled to succeed; (6) in default of the married daughter,

daughter's son; (7) in his default, the **father;** (8) failing him, the **mother;** (9) in her default, **brothers,** among them first the **uterine,** in his default, a **half** brother, if the deceased was re-united with a brother, then should there be only full-brothers, the re-united full-brother alone is entitled, in his default a full-brother who is not re-united; similarly should there be only half-brothers, then first the re-united half-brother, failing him a half-brother who is not re-united, when however a half-brother is re-united and a full-brother is not re-united, then both of them equally succeed; (10) in default of brother, **brother's sons,** amongst them also, first the full-brother's son, failing him the half-brother's son, in case of re-union, should there be only full-brother's sons, first the full-brother's son who is re united, failing him the full-brother's son who is not re-united; should there be only half-brother's sons, then first the half-brother's son who is re-united, failing him the half brother's son who is not re united, when however, the full-brother's son is not re-united and the half brother's son is re-united, then both of them, like the brothers, equally succeed; (11) in default of brother's son, **brother's son's sons,** amongst them also the order by reason of the brother being uterine or non-uterine, and order by reason of being re-united or not, are to be understood; (12) on failure of him, the **father's daughter's son,** he again is the full-sister's son or the half-sister's son; (13) in his default, the **paternal grandfather;** (14) on failure of him, the **paternal grandmother;** (15) in her default, the **father's uterine brother,** failing him the **father's half-brother;** (16) in his default the **father's full brother's son,** the **father's half-brother's son;** (17) the **father's full-brother's son's son,** and the **father's half-brother's son's son** are heirs in their order; (18) in their default the **paternal grandfather's daughter's sons,** amongst them also, the **father's uterine sister's son,** and failing him the **father's half-sister's son,** this rule is applicable also to the paternal great-grandfather's daughter's sons to be mentioned below; (19) in his default the **paternal great-grandfather;** (20) on failure of him, the **paternal great-grandmother;** (21) in her default, the **paternal grandfather's uterine brother, his half-brother;** (22) **their sons;** (23) **son's sons;** (24) and the **paternal great-grandfather's daughter's son;** in default of heirs down to these who are givers of *pindas* partaken of by the deceased proprietor, the succession goes to the maternal grandfather, the maternal uncle and the like who are givers of *pindas* which were to be given by the deceased; amongst them also (25) the **maternal grandfather;** (26) in his default, the **maternal uncle,** (27) **his son** (28) and **grandson** are entitled in their order: in their default the **Sakulyas** in the descending line who are givers of *lepa* or remnants of oblations, participated by the deceased, such as the three descendants beginning with the great-great-grandson, are heirs in their order; in their default the Sakulyas in the ascending line such as the patnernal great-great-grandfather and the like who are participators of the *lepa* or remnant of oblations which was to be given by the deceased, and their descendants

are heirs according to their proximity; in their default, the **samanodakas** are heirs; in their default, the **preceptor,** failing him, a **pupil,** in his default, the **fellow-student,** in his default, the **sagotras** and **samana-pravaras** of the same village are heirs in their order; in default of all the said relations, the **king** should take the estate other than that of a Bráhmana; but the estate of a Bráhmana should be taken by Bráhmanas endowed with good qualities such as the knowledge of the three Vedas."

Capacity for spiritual benefit.—The principle of spiritual benefit is examined at length at the end of this chapter. It will be seen that it is not the foundation of the right of inheritance, nor is it the only criterion of the order of succession. As regards the relative amount of spiritual benefit conferred by relations other than those whose succession has expressly been discussed by Jímútaváhana, there is absolutely no means, test or criterion whereby the same may be determined by us.

Spiritual benefit may be conferred by the so-called Sapindas in the secondary and the tertiary senses (*supra* p. 61), as well as by the *Sakulyas* and the *Samánodakas;* there are many factors to be taken into account for the purpose of ascertaining the respective amounts of such benefit, that may be bestowed by different relations; and having regard to these factors, it is difficult to say that the so-called Sapindas confer higher amounts of benefit than the Sakulyas, &c. Take for instance, the case of a brother's daughter's son and a Sakulya: as regards a *sakulya* his capacity to confer spiritual benefit by offering *pinda-lepas* or divided oblations as well as libations of water is certain and unconditional, and is transmitted after his death to his son and other male descendants; whereas a brother's daughter's son's actual capacity arises only after his own father's death, and dies with himself, so that his capacity is only *potential,* and may never become *actual,* should he die before his own father, and even when it becomes actual it can exist only so long as he is alive and cannot be transmitted by him to his heirs. Such being the case, how could it be said that the latter confers a higher amount of spiritual benefit than the former, when it may so happen that he cannot confer the slightest benefit at all.

Besides, the *Sakulyas* may, under certain circumstances, become *sapindas* by reason of the *sapindi-karana* for the deceased being performed with his fourth and other remoter ancestors in case the three immediate ancestors or any of them be alive at the time of the performance of that ceremony: see *supra* p. 62 and Text No. 12 at p. 57 *supra,* which is cited also by Raghunandana in his Suddhi-Fathwa. An exception

must be made in their favour, according to the view taken by the Full Bench of the doctrine of spiritual benefit.

As regards the maternal relations, admittedly they do not confer any spiritual benefit directly or indirectly on the deceased proprietor himself, but it is said that they confer benefits on the deceased's maternal ancestors to whom the deceased was bound to offer funeral cakes when he was alive. It has already been said that on such a ground as this, you can bring in only those who confer the greatest amount of spiritual benefit on the three maternal ancestors, in preference to the *sakulyas* who admittedly bestow benefits on the deceased himself, and on his paternal ancestors on whom also he himself was bound to confer spiritual benefits, and also bound to leave male issue for conferring such benefits on them after his death. So that the only four maternal relations mentioned above who have been mentioned by Raghunandana and Sríkrishna, are the only maternal relations that can properly be, and had all along been understood to be, placed before the Sakulyas.

The Full Bench begs the question by holding that every person offering a *pinda* to the deceased or to any one of his three paternal or maternal ancestors, confers higher amount of spiritual benefit than a Sakulya; for, there is nothing in the Dáyabhága, that may support this position: and Justice D. N. Mitter misapprehended the meaning of the term *Traipurushika-pinda* or funeral cake offered to three ancestors of the deceased; and even if his interpretation of the term be assumed to be correct, yet his argument is vitiated by the fallacy of composition or of applying to a class what is predicated of certain specified individuals of the same.

It is worthy of special remark that the arguments by which the author of Dáyabhága supports his conclusions are some of them opposed to well-known principles universally acknowledged by learned Pandits, and also opposed to the actual usages and practices of the people.

For instance, the maternal relations are introduced before the *Sakulyas* on the ground that it was the duty of the deceased to present funeral cakes to his three maternal ancestors, and that therefore the maternal relations who offer *pindas* to the same ancestors perform the same duty, and therefore benefit the deceased.

Now, it is a well-known doctrine of the Hindu practical religion that *A religious duty attaches to a person so long as he is free from impurity and pollution, and so long as he is alive*

यदि च-तत्कालजीवी कर्म्म कुर्य्यात् । Hence assuming that the deceased was bound in duty to present *pindas* to his three maternal ancestors, that duty dies with him, he is not bound to make any provision for the performance of the same duty by anybody else after his death. For, although a Hindu is bound to leave a son for the benefit of his paternal ancestors, his son cannot benefit his maternal ancestors. How then can the maternal relations benefit the deceased by offering *pindas* to his maternal ancestors, who are their own paternal ancestors to whom they are personally bound to offer *pindas?* For, they only discharge their own duty by performing their ancestor-worship which they can never, nor ever do, celebrate in two different capacities, namely, personal and representative.

Then again the ancestor-worship called the Párvana Sráddha, which is the foundation of the doctrine of spiritual benefit relied on as an argument by Jímútaváhana, is not really made for the benefit of the ancestors, but for the benefit of the worshipper himself, in the same manner as the worship of the various deities, celebrated by the Hindus. There is no authority in Hindu law that the *pindas* offered at the *Párvana Sráddha* ceremony, are actually enjoyed or participated in by those to whom the same are offered and by their male descendants. The interpretation put by Jímútaváhana (D.B., 11, 1, 38) on the text of Baudháyana (D.B., 11, 1, 37) is not supported by the language of the text (see *supra* p. 50): for, the Sanskrit word *Dáya* does not mean *pinda* or funeral cake, it means primarily a gift and secondarily heritage, and it is nowhere used in the sense of *pinda.* But Jímútaváhana alone construes the word as meaning *pinda* because its etymological meaning is "what is given" and a *pinda* is also a thing *given* or offered to invisible donees.

There is scarcely a Hindu to be found that performs the *Párvana Sráddha* regularly, that is, on each conjunction of the sun and the moon. A day is therefore set apart in the year, namely, the *Mahálayá* day in the month of A'swina, which is a public holiday, on which day the Hindus may, if they choose, perform the thirteen *Sráddhas* which they ought to have performed, one in every lunar month during a year.

So far as actual practices of the Hindus are found this *Párvana Sráddha,* is, seldom if ever, performed by the Hindus not belonging to the higher castes of Bráhmanas, Káyasthas, Vaidyas and the like, and even as regards the members of

these higher castes it is doubtful whether one in ten performs it, even on the *Mahálayá* day.

Hence the conferring of spiritual benefit on ancestors by presenting *pindas* to them in the *Párvana Sráddha* is a myth in the majority of instances And I have already told you that these are intended for the good of the worshipper, and not for the benefit of the ancestors.

There is, however, one Sráddha which in Bengal is performed by every Hindu on the day after the impurity occasioned by the death of the deceased proprietor is over, that is, on the 11th, 13th, 16th and 31st day including the day of death, in the cases of Bráhmanas, Kshatriyas, Vaisyas and Súdras respectively; but it is performed by the followers of the Mitákshará on the eleventh day, to whatever caste they may belong. This Sráddha is called the A'dya Sráddha or the first ceremony of the kind, which concludes the actual funeral ceremony commencing from the cremation rite. Fifteen other Sráddhas ending in the Sapindi-Karana Sráddha on the 1st lunar Anniversary of the day of death are enjoined for performance within the first year of death. These ceremonies are popularly believed to be beneficial to the departed spirit who is compelled to reside for one year in what is called Preta-loka, or the region for the departed souls, which is something like the purgatory, where the spirit, being severed from the relations in this world and not being allowed to join his ancestors in the next, is to remain in something like solitary confinement, until the end of the first year when the Sapindí-Karana ceremony is to be performed for him, which enables him to enter the *Pitri-loka* or the region of the Manes of ancestors.

Although these sixteen Sráddhas ending with the Sapindí-karana are popularly believed to be necessary for the comfort and peace of the departed spirit, yet the *A'dya* or first Sráddha is the only one which is universally performed, and as regards the rest they are not performed by most people who cannot afford to pay the expenses necessary for their celebration.

If capacity to perform the Sráddha ceremony be regarded as a factor in the matter of inheritance, then the capacity to perform these sixteen Sráddhas and not the *Párvana* Sráddhas, should consistently with reason and popular feelings, be taken into consideration.

Besides, the doctrine of *Adrishta* which is universally believed by the Hindus as the fundamental article of faith, is opposed to any spiritual benefit being derived by the deceased

from Sráddha ceremonies performed for him. *Adrishta* or the invisible dual force is the resultant of all good deeds and bad deeds, of all meritorious and demeritorious acts and omissions, done by a person in all past forms of existence and also in the present life, and it is this *Adrishta* which determines the condition of every soul, *i.e.*, is the cause of its happiness or misery; the state of a living being depends entirely on his own past conduct.

And this affords the strongest argument for the view that only the conclusions set forth in the Dáyabhága should be accepted, irrespective of the reasons whereby the same are sought by its author to be supported, which may not be cogent at all, nor necessarily acceptable to, or accepted by, the people, and that novel inferences deduced from them are not justifiable.

It would not be out of place here to enumerate the relations on whom the duty of performing the sixteen Sráddhas or *Preta-kriyá* is imposed, in their order. The following order is deduced by Raghunandana in his Suddhi-tattva from a consideration of various texts:—

"(1) Eldest son, (2) younger son, (3) son's son, (4) son's son's son, (5) widow, (6) widow having a son too young to be capable of performing the ceremony, (7) unbetrothed daughter, (8) betrothed daughter, (9) married daughter, (10) daughter's son, (11) younger uterine brother, (12) elder uterine brother, (13) younger half-brother, (14) elder half-brother, (15) son of younger uterine brother, (16) son of elder uterine brother, (17) son of younger half-brother, (18) son of elder half-brother, (19) father, (20) mother, (21) daughter-in-law, (22) son's maiden daughter, (23) son's married daughter, (24) son's daughter-in-law, (25) son's son's maiden daughter, (26) his married daughter, (27) paternal grandfather, (28) paternal grandmother, (29) the paternal uncle, (30) and the like *sapinda* (on the father's side), (31) Samánodaka, (32) Sagotra, (33) maternal grandfather, (34) maternal uncle, (35) sister's son, (36) *sapindas* on the mother's side, (37) Samánodakas on her side, (38) widow of a different caste, (39) unmarried wife (continuous concubine ?), (40) father-in-law, (41) son-in-law, (42) paternal grandmother's brother, (43) pupil, (44) priest, (45) preceptor, (46) friend, (47) father's friend, (48) fellow-villager of the same caste who is paid for,—these forty-eight are in their order entitled and liable (to perform the *Preta-kriyá* of a male)."

It is worthy of special remark that "a son's daughter's son"

or any other relation of the same kind, is not mentioned at all, although son's daughter and son's son's daughter are mentioned. And it cannot but be admitted that the above order affords the strongest evidence of degrees of natural love and affection of the relations who are to perform the last services to the deceased, although most of the females are excluded from inheritance, being disqualified by their sex.

The conclusion, therefore, to which we are constrained to come, is, that the capacity for spiritual benefit, such as is expounded by Justice D. N. Mitter, cannot and ought not to be made the basis of an order of succession, which is opposed not only to the feelings of the people but also to the natural development of law.

Natural love, and number of degrees of relationship.—Europeans among whom the joint family system is unknown, and who are ignorant of the natural influence of the system in moulding the growth of love and affection of the members towards each other, and also towards their children in the same manner as if they were their own,—may very well take the strength and intensity of natural love and affection between a man and his relations to be inversely proportional to the number of degrees by which they are distant from him. But the same can, by no means, be predicated of Hindus who live in joint families, the joint family system being the normal condition of Hindu society. It goes without saying that those who are called to live together from their birth, and are associated together in times of joy as well as of distress, and who help and are expected to help each other whenever necessary, are tied together by bonds of union which cannot but be very strong in the nature of things, quite independent and irrespective of the number of degrees of relationship. The Hindus would be astonished to learn that there are European Judges who could not be induced to believe that in a joint family the natural love and affection of the grandparents for their grandchildren, are at least equal to, if not greater than those of their own parents: for, the love and affection that are called *natural* are really to a great extent *acquired* by reason of certain causes that do apply more to the paternal grandfather and grandmother of children in a joint family, than to their father and mother, to whom alone the causes would have applied had they lived separate, like the Europeans. And I have already told you that the agnates, though distant, have bonds of closer union to be attached to each other than the cognates as a general body

(*supra* p. 73). Hence, although a son's daughter's son or a brother's daughter's son may, in the estimation of Europeans and of some English-educated Hindu "lawyers without Sanskrit," be deemed, having regard to the number of degrees of distance, to be very near and dear relations, yet they are in the estimation of the Hindus very distant relations, by reason of their belonging to different families; and it cannot but be admitted that amongst the majority of the Hindus who are followers of the Mitákshará, all cognates, with the single exception of the daughter's son in case the deceased was separate, are considered to be inferior to the agnates, however distant, who are recognized as heirs in preference to all other cognates agreeably to the principle of propinquity which is the admitted criterion of the order of succession in the Mitákshará School.

The custom relating to the observance of mourning affords the strongest possible evidence of the nearness of the *sakulyas* and the *samánodakas*: all his *sakulyas* have to observe mourning at the death of a Hindu, for the same period as is provided for his own son, that is to say, 10, 12, 15 and 30 days respectively for the four castes in their order; it should be borne in mind that for the purpose of mourning, *sapindas* under the Dáyabhága are those relations who are *sagotra sapindas* under the Mitákshará, see D.B., xi, i, 41-42; remoter agnate relations residing in the same village do also *actually* observe mourning like the *sakulyas*, though the period of mourning ordained in the Shasters, for them, is three days only, which is also the period for nearest cognates such as the daughter's and sister's sons, while the brother's daughter's son and the rest whom the Full Benches have introduced before *sakulyas* are not required to observe mourning even for a single day.

But nevertheless, one of the unnatural consequences of the principle of spiritual benefit being supposed in the manner explained by the Full Bench, to be the criterion of the order of succession, would be, that some cognates would take the inheritance in preference to agnates of the same degree,—a result which is—**opposed not only to every system of Jurisprudence but also to the very text of Manu on which the doctrine is based.** A student of comparative jurisprudence will find that at first, cognates were not recognised as heirs at all, then in the course of progress they were recognised as heirs, but were placed after all the agnates; then, some of them were permitted to have a position in the order of succession, in preference to more distant agnates; and the last stage of development has been, to

abolish all distinctions between agnates and cognates; but it is nowhere found that cognates take in preference to agnates of the same degrees with themselves.

Take for instance the Roman law: the Twelve Tables did not at all include the cognates in the category of heirs. In course of time when the family union became less strong, and importance began to be attached to the nearness of kin, irrespective of the family, the exclusion of all cognates from inheritance came to be regarded as unnatural and as a survival of an archaic institution; the Prœtor Urbanus recognized the heritable right of certain cognates under the pretext of giving them forms of action. And at last all distinctions between agnates and cognates were abrogated by Justinian.

The Mahomedan law also discloses similar development. The Sunni School appears to be anterior to the Mitákshará on the point of development; for, it postpones all cognates without any exception, to agnates however distant. According to this school, even the daughter's son is excluded from inheritance by the remotest agnate. The Shia School, however, has abolished this distinction between agnates and cognates as regards the right of inheritance, although the agnates still enjoy certain privileges showing their superiority to the cognates.

We find similar development in Hindu Law to a certain extent. Manu does not recognize the cognates as heirs at all; the daughter's son mentioned by Manu to be equal to a son's son, refers to the *appointed* daughter's son—a kind of adopted son who is an agnate, and not a cognate.

Cognates are, later on, recognized as heirs for the first time, by Yájnavalkya who places them after the agnates. Then the Mitákshará made a change in the law by giving to the daughter's son a very superior positon in the order of succession, as has already been said; and the Dáyabhága has given to some other cognates a position in preference to many agnates.

The Hindu law, however, has not yet arrived at that stage in which the distinction between agnates and cognates is abolished, by reason of the joint family system, which is the foundation of the distinction, still prevailing in Hindu society: agnates live together jointly, excluding cognates.

But the development of law, whereby cognates are preferred to agnates of the same degree with themselves is quite unnatural and unprecedented in the history of law, and is not at all sanctioned by the sages; for instance, son's son's daughters' son taking in preference to son's son's son's son,

brother's son's daughter's son taking in preference to brother's son's son's son, and the maternal great-great-grandfather's descendants taking in preference to the paternal great-great-grandfather's descendants. It appears so unreasonable that the High Court did at first refuse to sanction it: see 24 W.R., 229. This decision was pronounced erroneous by a Full Bench, the judges of which did not decide the question but thought themselves bound by the judgment of the first Full Bench, although the only question before the latter was, whether a brother's daughter's son and the like were heirs at all. And they entirely lost sight of the principle of propinquity.

It has already been observed that although the text of Manu on which Jímútaváhana relies, may support his theory with respect to the three maternal relations, namely, the uncle and his two descendants, yet it cannot be applied to the eight daughters' sons. Manu says,—"To three (ancestors) should libations of water be offered, for three is ordained the offering of *pindas* or obituary oblations: the *fourth* is the giver of them, the *fifth* has no concern in them."

It should be noticed that the terms *fourth* and *fifth* in this text of Manu are used relatively to the remotest of the three ancestors: hence, it can by no means be so construed, as to include any of the daughters' sons who must be *fifth* in relation to the remotest of his three maternal ancestors to whom he offers *pindas*; since the mother must be one degree in the computation of degrees, though she is not one of the three ancestors on the maternal side to whom *pinda* is offered.

The grandsons by daughter of the *propositus* himself and of his three paternal ancestors are introduced by Jímúta on the authority of a special text declaring the equality of a son's son and a daughter's son with respect to the capacity for spiritual benefit, which text cannot apply to a son's daughter's son, or a brother's daughter's son, or the like, who confers such benefit only on the son or the like, *i.e.*, on his own maternal grandfather only, by virtue of that special text, but not on the *propositus*, nor on his father or the like: D.B., xi, vi, 9.

Thus it is clear that the texts on which Jímúta relies cannot support the *inference* drawn by the Full Bench. For, had what is ascribed to Jímúta been his true intention, he would certainly have expressly mentioned at least one of these daughters' sons.

Case-law and altered order of succession.—In the case of *Gurugovinda* v. *Anund Lall*, 5 B,L.R., 15, = 13 W.R., F.B., 49, the uncle's daughter's son was held to be an heir, and it

was admitted by Babu (subsequently Justice and afterwards Sir) Romeschandra Mitter that if he whose claim was resisted by his client, be held to be heir, he would succeed in preference to his client who was a *sakulya* ; and the reason for this admission seems to have been that if the doctrine of spiritual benefit, upon which Justice D. N. Mitter wanted to base that claimant's heritable right, be correct, then he must take to the exclusion of *sakulyas*. It did not strike any one then, that the said claimant might be an heir, yet he might hold the same place under the Bengal School as under the Mitákshará School. It is, however, clear that having regard to the question for their consideration this Full Bench was not called upon to decide the question as to the exact position of the paternal uncle's daughter's son in the order of succession.

However that may be, the result is that all the second and the third class Dáyabhága *sipindas* (see *supra* p. 61 and the tables at pp. 65-66) may be contended, according to the reasons set forth in the judgment of Justice D. N. Mitter, to be preferable to the *sakulyas*. But in so doing you must altogether ignore propinquity the fundamental principle of inheritance, contrary to the Dáyabhága school.

Although Full Benches are said to settle doubtful points of law, yet the effect of the above Full Bench decision has been to unsettle the whole law of inheritance.

It should be observed that eight daughters' sons were by necessary implication recognised by that Full Bench as heirs: they are, (1) son's daughter's son, (2) son's son's daughter's son, (3) brother's daughter's son, (4) brother's son's daughter's son, (5) paternal uncle's daughter's son, (6) paternal uncle's son's daughter's son, (7) paternal granduncle's daughter's son, (8) paternal granduncle's son's daughter's son.

The precise position of these in the order of succession has been the subject of dispute in many cases. The contention on behalf of them has been that the two descendants of the *propositus* should succeed in preference to his parents and their descendants, and the two descendants of the father should take in preference to the grandfather, and so on.

But this contention could not be accepted and given effect to, except by overriding the order given in the Dáyabhága. The first case on the point was that of *Gobindprasad* v. *Moheschandra*, 15 B.L.R., 35=23 W R., 117, which was decided by two eminent Judges of the Calcutta High Court, namely, Chief Justice Sir Richard Couch and Justice Ainslie, who held

that these eight daughters' sons cannot be placed before the paternal great-grandfather's descendants, including his daughter's son (No. 24 *supra* p. 286); the competition in that case was between the brother's daughter's son and the paternal grandfather's great-grandson, and the latter was held preferable.

The correctness of this decision was impeached in many subsequent cases, but it has been uniformly followed: see I.L.R., 4 C., 411 and note; I.L.R., 11 C., 343; I.L.R., 15 C., 780; besides there are many unreported cases.

But nevertheless some judges of Mofussil courts misunderstand the effect of the above rulings of the High Court, and commit errors by following the arguments in the judgment of Justice D. N. Mitter..

The order of succession among these eight daughters' sons is the order in which they have been enumerated above: 10 C.L.R., 484.

In a case of competition between these eight daughter's sons on the one hand, and the maternal relations on the other, the former are to be preferred agreeably to the exposition by the Full Bench, of the principle of spiritual benefit; accordingly it has been held that the father's brother's daughter's son is entitled to succeed in preference to the mother's brother's son: *Braja* v. *Jivan*, I.L.R., 26 C., 285.

The order of succession amongst the maternal relations who come within the *sapinda* relationship expounded by Justice D. N. Mitter is in the order in which I have numbered them in the genealogical tree, *supra* p. 66. It must be exactly similar to the order amongst the three paternal ancestors and their descendants, excepting this that the three maternal female ancestors are not recognized as heirs.

The question whether the eight daughter's sons and the maternal relations other than the maternal grandfather and his three descendants, should be preferred to the *sakulyas* has not, as I have already said, actually been judicially discussed and decided by the High Court in any case.

In the case of *Kasinath Roy*, 24 W.R., 229, in which there was a competition between the brother's son's son's son and the brother's son's daughter's son, the former who is a *sakulya*, was preferred to the latter who is a *sapinda* according to Justice D. N. Mitter's exposition of the principle and the order of succession. The learned judges could not accept the view that a cognate should take to the exclusion of an agnate of an equal degree.

The corretness of this decision was called in question in the case of *Digumber* v. *Motital*, I.L.R., 9 C., 563, in which the competition was between the brother's daughter's son and the great-great-great-grandfather's great-great-great-grandson; and the question was referred to a Full Bench for their consideration. But this Full Bench refused to judicially decide the point, as the learned judges thought themselves bound by the decision of the first Full Bench, although the judges thereof were not called upon to decide the point, as it was not at all referred to them. The brother's daughter's son was held preferable.

Thus has arisen an unsatisfactory and abnormal state of the law, in which certain cognate relations whose very existence may be unknown to the deceased proprietor, would become his heirs in preference to the *sakulyas* living, it may be, in the same house with him, and regarded by him as near and dear relations.

In discussing the question the learned Judges have completely ignored the principle of propinquity and confined their attention exclusively to the principle of spiritual benefit alone. But it is absolutely impossible to explain and maintain the accepted and now settled and undisputed order as set forth in the Dáyabhága without recourse to the principle of proximity. But yet it is not even alluded to in the decisions on the question.

It may be asked,—Does a Hindu, in the ordinary state of things, know even the existence of the daughter's son, of the son and the grandson of the maternal great-grandfather or great-great-grandfather, or even of the son and grandson of the maternal grandfather? The answer is obvious. Any one acquainted with the customs, manners and habits of the Hindus, and pausing to think about the matter, cannot but wonder how these daughter's sons could be preferred to *sakulya* relations who have to observe mourning at the death of the deceased proprietor for the same period as his own son.

The question is one which ought to be judicially considered, and the law enunciated according to the true construction of the Bengal commentaries, by a Full Court of all the judges, and there is a precedent for this course. If, however, the High Court be not disposed to reconsider and overrule the Full Bench decisions, the Legislature ought to be moved to codify the law consistently with the feelings of the Hindus of Bengal, in consultation with learned Pandits and some English-educated Hindu lawyers.

Some explanations.—The male issue take *per stirpes;* and as regards them, the right of representation obtains down to the third degree.

But the sons of different daughters, as well as all collateral relations of equal degree, take *per capita,* nor is in their case the right of representation.

A relation claiming to be an heir must be in existence, at the time when the succession opens: subsequent birth of a nearer heir cannot have the effect of divesting the estate already vested in a more distant heir: *Kalidas* v. *Krishan,* 2 B.L.R., (F.B.), 103.

The nature and incidents of the estate taken by the female heirs in the property inherited by them from their male relations, shall be discussed in detail, later on.

The preference based upon whole blood when two relations are in other respects equal, appears to apply to all collateral relations according to the Dáyabhága. But as the principle of propinquity is entirely ignored and the doctrine of spiritual benefit is deemed in modern decisions to be the sole criterion for deciding every question relating to inheritance in the Bengal School, it has accordingly been held (I.L.R., 11 C., 69) that a half-sister's son is entitled to inherit together with a full-sister's son, there being no difference in the amount of spiritual benefit conferred by them respectively. But see Srîkrishna's Recapitulation *supra* p. 331-2, showing that relations of the whole-blood should be preferred,—a proposition based upon express texts of the Smriti: D.B., xi, v, 10, see *supra* p. 298, and D,T., xi, § 63. Upon the authority of this decision, the preference on this ground is to be confined to the nine collaterals among the first class Dáyabhága *sapindas,* namely, a brother, an uncle, and a granduncle, and their descendants; it will not apply to any other relations.

Re-union after separation is another cause for preference. It proves that the doctrine of spiritual benefit is not the sole criterion. This subject has already been dealt with: pp. 303-4.

The effect of the operation of these two grounds of preference in the cases of brothers, nephews and uncles is as follows:—

A re-united brother or nephew or uncle, of the half-blood, respectively, succeeds together with a brother or a nephew or an uncle, of the whole-blood, if the latter is not re-united: the ground of one's being a relation of the whole-blood, is counterbalanced by that of the other's being re-united.

But the preference has been extended by the case-law to

sons of re-united co-parceners, which appears to be overruled by the Privy Council: see *supra* pp. 303-4.

There is an express text laying down the joint succession of a full-brother and a half brother to the immoveable property left by an undivided brother living jointly with them; the text is cited in the Dáyabhága which explains the law accordingly: Ch. xi, Sect. v, paras. 35 & 36. A clear text of the Smriti cannot but be followed; but a Full Bench rejected the authority of both the text and the commentary, because they seemed to the learned judges to be inconsistent with the author's principle of spiritual benefit: I.L.R., 1 C., 27; see *ante* p. 28.

The inheritance of the preceptor, a pupil and a fellow-student has under the altered state of society become almost a thing of the past. Do not, however, think that we may become heirs to each other: nor that the *Dikshá-Guru* can come under the term 'preceptor.'

The relation between the preceptor and a pupil was a very strong one in old times, when a pupil had to live with the preceptor as a member of his family, and to procure the maintenance of himself and his preceptor by begging alms, a practice now found in Burma, which is calculated to drive out all vanity and conceit from the minds of boys.

Examination of the Principle of Spiritual Benefit.

At one time it was thought that the doctrine of spiritual benefit is the key to the Hindu law of inheritance. It is now, however, admitted on all hands that the doctrine has nothing whatever to do with the *Mitákshará* law of inheritance. But you must not think that the *Mitákshará* is silent about the *sráddha* ceremonies forming the foundation of the doctrine. On the contrary you will find in the A'chára-kánda a minute and exhaustive description of the various matters concerning those ceremonies. But the author of that treatise does not even allude to those ceremonies while dealing with inheritance, so as to imply any sequence between the two. There are, however, a few passages in that part, implying rather the converse of what is understood by the doctrine of spiritual benefit: in other words, relations that become heirs are required to perform the exequial ceremonies for the deceased; but they are not held to become heirs because they confer spiritual benefits.

By the expression "exequial ceremonies" I mean the sixteen *sráddhas* ending with the *Sapindíkaran* ceremony. These are the most important ceremonies, but only one of them is (*supra* p. 336) regularly performed by every Hindu that has not openly renounced Hinduism. The last ceremony has, as I have already said, the effect of uniting the deceased with his departed *paternal* ancestors in the next world. But for this, his spirit would have roved over the earth, in something like solitary confinement. These ceremonies are required to be performed by relations

male or female in a specified order, the next in order being competent to perform in default of the first. Some of these relations, however, are not in the category of heirs, see *supra* p. 337.

The author of the Dáyabhága deals with the order of succession in the eleventh chapter of that treatise. In laying down the order he professes to interpret certain texts of the sages, which set forth the order to some extent by *naming* the relations, and then end with generic terms; and he refers to the capacity for conducing to the spiritual benefit of the deceased as *one* of the many reasons in support of his exposition of the order of succession deducible from those texts.

The author does not, however, allude to the above-mentioned sixteen *sráddhas* or to the *ekoddista sráddha*, in considering the capacity of a relation to confer spiritual benefit. He confines his attention to the *párvana sráddhas* alone for the purpose. I have already said that these ceremonies are regularly performed by none: and although the unwillingness of the people to regularly perform the ceremonies, has given rise to the rule that these may be performed once for a year, and a day named *mahálayá* is set apart for that purpose, still very few Hindus of the present day observe these ceremonies. This omission is rather to be regretted and is due mainly to the ignorance of the people in general as to what is meant by the ceremonial conducted in Sanskrit. They are calculated to exercise a very salutary influence on the human mind, by forcing on it the idea of the vanity of the world, like a walk in a cemetery.

You will be in a position to clearly understand the doctrine of spiritual benefit if you examine how the author of the Dáyabhága makes use of that theory. The following is a summary of the references in the Dáyabhága to this principle :—

1. A grandson by a predeceased son and a great-grandson whose father and grandfather are both dead, inherit together with a son. The reason assigned is, that these three confer equal amount of spiritual benefits by performing the *párvana sráddha*, Ch. iii, Sect. i, para. 18.

A grandson whose father is alive cannot perform the *párvana* so he cannot take, Ch. iii, Sect. i, para. 19. Potential capacity is here disregarded.

You will remark that a son offers three oblations, a grandson two, and a great grandson one, but this difference in the number of oblations is taken to be of no effect. It is also to be noticed that when they confer equal amount of spiritual benefit, why do they not take *per capita*, if the doctrine be the sole criterion of inheritance ?

2. Widow succeeds to the state of the *sonless* husband, by virtue of express texts. Conflicting texts are referred to. They are reconciled by holding that the contrary texts do not intend to lay down the order of succession, but to enumerate the heirs. You will bear in mind that from these texts the author of the *Mitákshara* deduces three different modes of devolution.

The author of the Dáyabhága in Ch. xi, Sect. i, paras 31-44 invokes the aid of the doctrine of spiritual benefit in support of his conclusion in favor of the widow's succession. He cites many texts in which the sages declare that the birth and existence of the three male issue are spiritually beneficial to the father and other ancestors, independently of the performance by them, of any religious ceremony for offering *pinda* : D.B.,

xi, i, 31. Upon the authority of these texts he explains the term 'sonless to mean, destitute of son, grandson and great-grandson, on the ground of spiritual benefit. This latter position is again supported by an exposition of the *sapinda* relationship, by putting a novel meaning on the term *dáya* in a text of Baudháyana, according to which, however, the first class *sapindas* only may come under that term. He further states that next to the male issue, the widow may confer spiritual benefits by practising austerities; and adds that she might cause her husband's soul to fall to the lower region by leading a vicious course of life for want of wealth.

The widow cannot perform the *párvana sráddha.* She succeeds for two peculiar reasons: 1st, she is the surviving half of the deceased husband: 2nd, her unique capacity for conferring spiritual benefit, very different from the rites upon which the Full Bench relies.

3. Daughter's succession is based upon express texts. She herself cannot confer any spiritual benefit, but her son may do so. The daughters that are sonless and not likely to have sons are excluded.

The maiden daughter is preferred to others; as her marriage is requisite for the spiritual welfare of her departed paternal ancestors, who would otherwise fall to a region of torment. But there is an express text for this preference.

If the spiritual benefit derived from *sráddhas* were the only criterion, the daughter's son ought to have been held preferable to both maiden and married daughters.

4. Daughter's son. There are express texts in favor of his succession. There are also texts to the effect that he confers peculiar spiritual benefit like the son's son, by his very birth and existence apart from the offering of *pindas.* All these texts, however, really refer to the appointed daughter's son, *i.e.*, a kind of adopted sons and not to the ordinary daughter's son.

5. Father's succession is based upon express texts. He is postponed to the daughter's son, because he offers two oblations and the daughter's son three.

You will observe that in this instance the potential capacity alone is looked to. The daughter's son may not actually present any oblation at all. For if his father be alive he is not competent to perform the *párvana sráddha,* and if he predecease his father he can bestow no spiritual benefit at all, by offering oblations. The daughter's son's son does not offer any oblation.

You will bear in mind that the *párvana sráddha* is not separately performed in honour of the maternal ancestors. It is a ceremony in honour of the paternal ancestors alone. When it is performed, then the maternal ancestors also are worshipped, bnt not in all cases.

According to the doctrine of spiritual benefit, the father and the paternal uncle ought to have succeeded together, as both of them offer two oblations. Propinquity alone can explain the father's preference.

The father is preferred to the brother whose capacity for spiritual benefit is superior to the former's, but potential during his life: you cannot prefer the father unless you take the latter circumstance as a criterion for postponing, which you have not done in the case of the daughter's son, or unless you rely on propinquity whereby only you may prefer the father to the brother.

6. Mother's right is based upon express texts. Reasons for preferring her to a brother are, gratitude in return for secular benefits received.—a new factor, and her capacity to confer spiritual benefits by giving birth to sons.

She can inherit when a widow, and if she has no male issue then, she cannot even indirectly confer any spiritual benefit in the said manner.

In strict accordance with the doctrine of spiritual benefit, as understood by the Full Bench, she ought to have been postponed to many others. The doctrine must be given up in her case which can by no means be brought under it.

7. Brother's succession after the parents is expressly mentioned in the texts. There is an express text for the preference of whole blood. An additional reason assigned is that the full brother offers oblations to the deceased's own mother to whom he was bound to present oblations in the *párvana sráddha*, whereas the half brother offers to his own mother and not to the mother of the deceased.

Following the spiritual benefit theory strictly, a re-united half brother could not be held to succeed jointly with a full brother not re-united. Nor could re-union be taken to give preference in other cases.

The oblation presented to the mother is a new factor.

The full brother offers, therefore, six undivided oblations, or rather nine: three to paternal male ancestors; three, to the mother, the paternal grandmother and great-grandmother; and three, to the maternal male ancestors. Still, he is postponed to the father who offers only four, and to the daughter's son who offers only three.

8. After the brother comes the brother's son under the express texts. He offers two oblations. A full brother's son offers two more oblations to two female ancestors while a half brother's son presents only one such oblation to the deceased's paternal grandmother. This is set forth as an additional reason for the preference of the former.

Thus far, the order of succession is the same as under the Mitákshará, with the slight difference as to the order between the parents, and the inheritance of barren and sonless widowed daughters.

9. Then comes the brother's grandson; he is not expressly named but is included under the term *gotraja*. He offers one oblation.

The brother's son and grandson are preferred to the paternal uncle who offers two oblations inasmuch as they present oblations to the father who is to be principally considered.

The brother's great-grandson being the fifth in descent offers no undivided oblation and therefore cannot take now.

10. The sister's son comes in next. He presents three oblations.

11. Then the author of the Dáyabhága lays down generally that the grandfather's and great-grandfather's descendants, inclusive of their daughter's son, will take in the same way as the father's descendants.

The reasons assigned for the succession, in the above order, of the sons of daughters of the three paternal ascendants are, that they ought to take on the same grounds as the deceased's own daughter's son, and in the proximity of offering oblations and that they are included under the term *gotraja* in the text of Yájnavalkya.

The word *gotraja* is taken in the Mitákshará in the sense of *sagotra*

or agnatic relation: the author of the Dáyabhága takes it in its literal sense, namely, descended from the *gotra*. In this sense the sons of daughters born in the family may be called *gotrajas*, though it is far-fetched.

Then the author says that in default of the great-grandfather's descendants including his daughter's son, who offer oblations enjoyed by the deceased, the maternal uncle and the like succeed; because Yájnavalkya includes them under the term *bandhu*, and because they confer spiritual benefits upon the deceased by performing a duty which the deceased was bound to perform, namely by presenting oblations to their own paternal ancestors who are the maternal ancestors of the deceased.

He says that the uses of wealth are two, enjoyment and charity. When it cannot conduce to the enjoyment of the deceased, it ought to be appropriated to charitable purposes such as are calculated to confer spiritual benefit upon the deceased. He adds that the taking of the wealth by the maternal uncle and the like furnishes them with the means of presenting oblations to the maternal ancestors to whom the deceased was bound to *give* oblations; and the deceased is benefited by *gifts* of oblations to maternal ancestors by the maternal uncle and the like.

In Ch. xi, Sect. vi, paras. 12-20 and 28-33, there is a lengthy discussion on this subject. The real difficulty of the author, and the way in which he meets the same, will be better understood, if attention be paid to the following texts, one of Yájnavalkya and the other of Manu.

(1) The widow and the daughters also both parents, brothers likewise, their sons, the gentiles (*gotrajas*), the cognates *bandhus*, a pupil and a fellow-student: in default of the first among these, the next in order is heir to the estate of a sonless deceased man.—*Yájnavalkya*, (p. 282 *supra*.)

(2) To three must libations of water be made; for three is the offering of funeral cake ordained: the fourth is the giver of the same; the fifth has no concern in them. To the nearest *sapinda* the inheritance next belongs. After these the *sakulyas* or gentiles, the preceptor or the pupil.—*Manu*, (p. 51 *supra*).

You will see that, according to the plain meaning of the text of Yájnavalkya the cognates or *bandhus* can be heirs only in default of the gentiles. And this is the real difficulty in the way of the introduction of the maternal uncle and the rest before the *sakulyas* or gentiles.

The expedient hit upon by the author of the Dáyabhága is this. Manu does not name the cognates in the category of heirs. But there is a maxim that no code of law can be accepted if contrary to Manu. Therefore, in order that *bandhus* who are mentioned by Yájnavalkya may become heirs, we must hold that Manu also has mentioned them by implication. And the text—"To three must libations, &c.,"—is taken by the author to include the cognates by implication. Agreeably to this view, the cognates come first in Manu's texts, and then the *sakulyas*. The author means to say that, neither the enumeration thus obtained nor the enumeration by Yájnavalkya of gentiles and cognates one after the other, does indicate the order of succession. But the order is to be determined by the text "To the nearest *sapinda* the inheritance next belongs." The term 'nearest *sapinda*' is interpreted by the author to mean the *greatest-spiritual-benefit-giver*.

According to the author of the Dáyabhága, the cognates to whom

he has given a position before the *sokulyas* confer a greater amount of spiritual benefit than the latter.

They are the daughter's son, sister's son, father's sister's son, and grandfather's sister's son, as well as the maternal unele and the like.

The term 'maternal uncle and the like' has been explained by Sríkrishna and Raghunandana to mean the maternal grandfather, the maternal uncle, his son and grandson. The expression *traipurushika-pinda*, used by the author of the Dáyabhága in the course of the argument and the principle of reciprocity, may have influenced this explanation.

13. The *sakulyas* come after the maternal uncle and the like. There are express texts for their succession. They also confer spiritual benefit by offering *pinda-lepas* either to the deceased himself or to those to whom the deceased was bound to offer such oblations.

The doctrine of spiritual benefit is not referred to in dealing with the succession of the *samánodakas* and the rest, because both the schools agree as to their succession.

14. The founder of the Dáyabhága School intended to leave as the law of Bengal, the Mitákshará order of succession as modified by himself, mainly by introducing the seven or eight cognate relations before the *sakulyas*. It was not his object to deal with it in its entirety; but he may be mistaken to have done so by reason of the explanation of the texts cited by him on the order of succession, which clearly appears from the context to be merely parenthetical. It would be a great mistake to suppose that the order appearing from the said explanation is intended to be exhaustive, when the cognates that are expressly recognised as heirs in the Mitákshará are not at all taken into consideration by the author who would undoubtedly have done so, had he differed from the author of the Mitákshará. After having dealt with the order of succession, by way of explaining the texts cited, the author does, in paras. 21-33, again return to the discussion of the right of the cognates to whom he has already given a preferable position in the order of succession; for therein he principally differs from the Mitákshará. He argues that the *order* of succession as modified by him, agreeably to the theory of spiritual benefit, is the proper one: xi, vi, 30.

Then he concludes by saying that even if the learned be not satisfied that the *doctrine* is deducible from the texts of Manu, still the *order* of succession as laid down by him is supported by them.

Sríkrishna's comments on the above are that, according to the doctrine of spiritual benefit, strangers might come in as heirs; for any person, by throwing into the waters of the Ganges the ashes of the deceased's body after cremation, may confer upon the deceased an inestimable amount of spiritual benefit. This difficulty amongst many others, induced the author to make the last mentioned remark. See p. 63-64 *supra*.

15. I have already said that the order of succession amongst the paternal grandfather's and great-grandfather's descendants is not laid down in *extenso* by the author of the Dáyabhága. But Raghunandana and Srikrishna place them in the following order,—grandfather, grandmother, uncle, uncle's son, uncle's grandson, grandfather's daughter's son, great-grandfather, great-grandmother, granduncle, his son, grandson and

great-grandfather's daughter's son,—following the analogy of the order in which the parents and their descendants take. But this is clearly indicated by Jímútaváhana in Ch. xi, Sect. iv, paras. 4-6.

This order is not consistent with the oblation theory. But nevertheless this order is laid down by the author of the Dáyabhága.

Upon a review of the above references to the capacity for conferring spiritual benefit, it is very difficult to see how a clear and consistent principle can be deduced from them; or, how it may be said that it is the key to the law of inheritance. The other heirs after the *sakulyas* do not confer any spiritual benefit. As to libations of water, they are offered by strangers as well as by relations; nor is any authority cited supporting the rendering of the term *samánodakas* into those connected by libations of water.

It has, however, been asserted that the whole of Chapter XI of the Dáyabhága is nothing but a mere elaboration of the doctrine of spiritual benefit. But with the greatest deference to those that take this view, I say that I fail to see how such a conclusion can be come to, on a perusal of that Chapter. The object of the author appears, beyond the shadow of a doubt, to have been to lay down a particular *order* of succession, and to invoke the aid of that doctrine merely to fortify his positions. That doctrine itself has nowhere been fully and completely explained nor independently dealt with; but it has only been, in a subordinate manner referred to in the course of the arguments put forward in support of his positions.

And it may very fairly be doubted whether the induction of the doctrine of spiritual benefit and the generalizations made by the Full Bench in *Gurugobinda Shaha Mundul's* case are correct, when these are admittedly inconsistent with the order of succession specified by the author of the Dáyabhága. And I may repeat that I have not been able to find anything in that work from which the relative amount of spiritual benefits conferred by two relations can be ascertained in a case in which we have not the opinion of the author himself, reading, of course, the work in the way in which the Privy Council says it should be read, *viz.*—"but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Catyáyana's text taken by itself, as what are the conclusions which the author of the Dáyabhága has himself drawn from them." (I.L.R., 5 C., 776).

The doctrine appears, as I have already said, to have been introduced by the author of the Dáyabhága as a mere pretext for assigning in the order of succession a higher position to some dear and near cognates who, under the Mitákshará are all postponed even to the most distant agnate relation,—a pretext similar to that under which the Prætor Urbanus of Rome recognized the heritable rights of cognates.

Too much appears to be made of this doctrine for the sole object of recognizing the heritable right of the remaining cognates about whose heritable right and position in the order, the author of the Dáyabhága is silent; inasmuch as he intended to leave them in the same state as they were under the Mitákshará, he had nothing to say about them.

As to the cognates other than those named by all the authorities of the Bengal School as heirs before the *sakulyas*, their order is, no doubt, not mentioned in the Dáyabhága. But that does not show any intention to exclude them unless the enumeration of heirs in that treatise be held to be exhausitive.

Two questions arise with reference to this point; (1) How is their inclusion to be reconciled with their omission in the enumeration of the order? (2) Where are they to be placed?

Before proceeding to consider these questions, it ought to be mentioned that by the term cognate I mean to include all those that are included under the term *bandhu* in Yájnavalkya's text and in the Mitákshará. They are divisible into those that confer spiritual benefits by offering *pindas*, and those that do not.

The Full Bench decision in *Guru Govinda Shaha Mandal's* case is silent as to the second class; and the first class are held to be included in the category of heirs by the principle of spiritual benefit.

Now, the term *bandhu* occurs in the text of Yájnavalkya, laying down the order of succession. That text has been cited by the author of the Dáyabhága as an authoritative one while opening the subject of succession, Ch. xi, Sect. i, para. 4, and its authority has been invoked throughout the chapter. Maternal uncle and the like are said by the author to come under this term *bandhu*. But no explanation of the term has been given so as to enable us to understand who else are included by that term. The term *bandhu* has been explained in the Mitákshará, a work of the highest authority in all the schools not excepting Bengal where however it yields to the Dáyabhága, on points in which they differ. But, when the Dáyabhága is silent, the Mitákshará is to be consulted in the Bengal School as well. This has been laid down by the Privy Council at least in two cases: (see p. 33 and the Unchastity case). Hence all relations that are *bandhus* under the Mitákshará are also heirs in Bengal. With this difference that the sister's son, the father's sister's son and the like who are descended from agnatic relations are included, by the author of the Dáyabhága, under the term *gotraja*.

It has already been said that the enumeration of the distant heirs was not the object of the author of the Dáyabhága. It is rather given by way of digression from the subject he was considering. He was contending for the higher position of certain cognates; and, in doing so, he cited certain texts bearing upon the order of succession; and, as a commentator, he offered parenthetically his explanations of the same and then returned to his subject with which he concluded. It would, therefore, appear that he intended to leave the distant succession in the same state in which it was in the Mitákshará. This view is supported by Raghunandana the next highest authority in Bengal who introduces the cognates again after the agnates.

As to the precise position, there would be no difficulty whatever if the rule contained in the Mitákshará and the Dáyatattva be followed. But this would be opposed to our present sense of natural justice. The expression natural justice means, if it means anything definite, the speaker's sense of what ought to be.

The question has, in several cases, arisen before the High Court with

reference to the eight relations beginning with the son's daughter's son, four of whom may offer two oblations and the rest one oblation, to be partaken of by the deceased.

I have already told you that it is now settled by the High Court that these relations cannot be placed before the great-grandfather's daughter's son.

The contention therefore, must now be confined to this position that, they are entitled to take before the relations on the maternal side and before the *sakulyas.*

Their position before the maternal side is in direct opposition to what the author of the Dáyabhága has expressly said. The author has laid down that the maternal uncle and the like are to succeed after the great-grandfather's daughter's son. When the author of the Dáyabhága says so, we are bound to conclude that, after the great-grandfather's daughter's son, the maternal uncle and the like confer the greatest amount of spiritual benefit, admitting that to be the sole criterion of inheritance. Both these sets of relations confer spiritual benefit; and we have no reason to assume, in the face of what is said by the author, that the maternal uncle and the like confer a lesser amount of benefit. There is nothing in the Dáyabhága from which, directly or by implication, such a conclusion can be deduced. See Ch. xi, Sect. vi, para. 20.

Besides, there is no other ground for preferring the brother's daughter's son or the nephew's daughter's son to the mother's brother.

A plausible argument, however, may be raised in favour of the successions of the eight relations before the *sakulyas*, but there is not an iota of reason for placing them before the maternal uncle and the like.

The competition between a maternal uncle or the like on the one hand, and any one of the eight relations on the other, presents a difficult question in consequence of the conflict between what is expressly stated in the Dáyabhága and the view of its principle taken by the Full Bench.

The point for consideration is whether those eight cognate relations and the maternal relations other than those specified above,—who are *sapindas* according to the Full Bench,—are to be preferred to *sakulyas.*

It is contended that the three classes of *sapindas* must, according to the doctrine of spiritual benefit, be held to come before the *sakulyas.* The former are assumed to confer a greater amount of spiritual benefit than the latter.

Let me once more draw your attention to the ceremony of *párvana sráddha,* the foundation of the doctrine. A person does, according to that ceremony, present three oblations to his father, paternal grandfather and great-grandfather; three to his mother, paternal grandmother and paternal great-grandmother; three to his three maternal *male* grandsires; and three *pinda-lepas* or divided oblations to his 4th, 5th and 6th paternal male ancestors in the male line. And, by so doing, he confers spiritual benefits on them. Hence a person is bound to confer spiritual benefits on his six paternal male ancestors, on his three paternal female ancestors and on his *three* maternal *male* ancestors. Those that confer spiritual benefits on these ancestors of a person are held to confer spiritual benefits upon him. A person, after his death, partakes of undivided oblations presented to those ancestors with whom he is united

by the *sapindí-karana* ceremony. Such ancestors must be his three *sagotra* male ancestors, *i.e.*, his father, paternal grandfather and great-grandfather. While dealing with the *sapinda* relationship, I have pointed out to you that such ancestors are not necessarily his three immediate ascendants, but may consist of his 4th, 5th and 6th ascendants, under certain circumstances. The paternal great-grandfather may be considered to offer *pindas* enjoyed by the deceased agreeably to the foregoing rule, and the deceased becomes actually the *sapinda* of the 4th, 5th and even of the 6th ancestors.

Spiritual benefit is, therefore, conferred in three ways: (1) by offering an undivided oblation to the deceased himself or to those with whom he partakes of undivided oblations; (2) by conferring spiritual benefit upon those on whom the deceased was bound to confer spiritual benefit, and (3) by offering *divided* oblations to the deceased and to his ancestors.

A person conferring spiritual benefit in the first way is *assumed* to confer a greater amount of spiritual benefit than all relations conferring such benefits in the second way. It is further *assumed* that no *sakulya* can confer spiritual benefit in the first way

There is nothing in the Dáyabhága, expressly or impliedly, supporting the first assumption. On the contrary, the position assigned to the maternal uncle and the like, just after the great-grandfather's daughter's son, negatives such an idea. As to the second, suppose a man dies during the lifetime of his father, then he is united by the *sapindí-karana* ceremony with his paternal grandfather, great-grandfather and *great-great-grandfather*, and suppose the last to have a great-grandson living; then this great-grandson offers an undivided oblation to the *great-great-grandfather*, and this oblation is participated in by the deceased. The second assumption too proves to be incorrect.

The author of the Dáyabhága does nowhere lay down as a general rule that the amount of spiritual benefit varies directly as the number of oblations, or that an oblation enjoyed by the deceased is more valuable than oblations offered to ancestors to whom he was bound to present oblations, or that undivided oblations are of greater value than divided ones.

There is, however, only one sentence, used by the author of the Dáyabhága in the course of an argument, that does apparently seem to support the last of three propositions mentioned above; and that is the slender basis upon which an argument may be based for the exclusion of the *sakulyas* by the three classes of *sapindas*. See Ch. xi, S. vi, 17. But that is not his conclusion; had it been so, it would not still have supported the above position in its entirety.

His conclusion or rather the re-statement of his position set forth in paragraph 12, is contained in paragraph 20: paragraphs 13-19 contain his argument for that position, which is summarised in paragraph 19; and it is, that the cognates already mentioned that offer *trai-purushika pinda* are to be preferred to the *sakulyas*. Everything therefore hinges on the meaning of the expression *trai-purushika pinda* or *pinda* offered to three *purushas* on the paternal or maternal side. Now, so far as I am aware of, the term *purusha* is used in Sanskrit law-books to denote an ancestor; and where a numeral is prefixed to the term, such as in the phrase 'three *purushas*' or 'seven *purushas*,' the person with reference to

whom the expression is used is taken as one of the three or seven. A brother or a son cannot be deemed a *purusha* of a person. Now, if this is correct, then a person may be said to offer *trai-purushika pinda*, if he offers three *pindas* to the deceased and his two ancestors, or to his three ancestors only.

Now a brother's daughter's son can by no means be held to offer *trai-purushika pinda*. The brother's daughter's son offers one *pinda* to the brother, another to the father and a third to the grandfather; so he offers *dvai-purushika pinda*, or *pindas* to two ancestors only, namely, the father and the grandfather of the deceased. Similarly, the son's daughter's son offers to the deceased and his father only. You must bear in mind that these daughter's sons offer no *pinda-lepas* or divided oblations to their remoter maternal ancestors.

It may be objected that how may then the maternal uncle's son be said to offer *trai-purushika pinda*; he offers one oblation to the maternal uncle, another to the maternal grandfather and a third to the maternal great-grandfather; so he offers to two ancestors only. This objection may be obviated by the circumstance that he offers *pinda-lepas* to his remoter ancestors, and so he may be taken to offer *trai-purushika pinda*. This view is supported by what is said by the author in another place. Besides, the maternal uncle and his two descendants confer by their very birth inestimable benefits on the three maternal ancestors of the deceased, on whom he was bound to confer spiritual benefit.

But still another objection may be raised, namely, how can the maternal grandfather be said to present *trai-purushika pinda?* The answer is, that he offers *pindas* to his three ancestors who are also the ancestors of the deceased, although the deceased was not bound to confer spiritual benefit upon the third ancestor of his maternal grandfather. It should, however, be noticed that the author himself does not mention the maternal grandfather by name, the expression used by the author of the Dáyabhága is, 'maternal uncle and the like,' although his succession before the maternal uncle is intended by him. Raghunandana places him before the maternal uncle, following the analogy of the father's succession before the brother. The reason appears to be that the maternal uncle and the like can confer no spiritual benefit so long as the maternal grandfather is alive; the maternal grandfather is nearer than his descendants; and the wealth taken by him will ultimately enure for the benefit of his descendants. The truth is, that capacity for spiritual benefit is only a mere pretext and has already been shewn to be not consistent.

The traditional interpretation of the Dáyabhága supports the above exposition of the expression '*trai purushika pinda*.' The only cognates, to whom the author of the Dáyabhága was all along understood to assign a higher position, were the daughter's son, the sister's son, the father's sister's son, the grandfather's sister's son, the maternal grandfather, the maternal uncle, his son and his grandson. The mother's sister's son also comes within the principle, and his place is after the maternal uncle's grandson, by analogy. And the argument which contains the expression *trai-purushika pinda* was advanced to support the succession of these cognates in the order already asserted by the

author, and not to lay down any such general principle as is supposed by the Full Bench. If the intention of the author were to include also the brother's daughter's son and the rest, he would certainly have named at least one of them, while there were so many occasions for doing it in the course of the arguments.

As to the eight relations, namely, the sons of daughters born in the family you will observe that their capacity for conferring spiritual benefits may be merely potential; and, even when it is actual, it ceases with their own existence: they can leave no descendant that can conduce to any kind of spiritual benefit of the deceased. There is no reason why the duration of the capacity should not be taken as a factor in calculating the amount of benefit. With respect to this point, the *sakulyas* are superior to these eight relations. With regard to the sons of the daughter of the *propositus* and of his three ascendants, there is an express text laying down that a daughter's son like a son's son confers peculiar benefit on his maternal grandfather from the moment of his birth. So, these latter are in a different position. But the above factor may have influenced the author of the Dáyabhága in laying down, as he has done in one passage, that even the daughter's son is entitled to a life-interest in the estate inherited from his maternal grandfather: Ch. xi, Sect. ii, para. 31. You must not, however, mistake this for the law on the subject; because, the author having laid down that, goes on to say, 'or the female heirs will take a life-interest.' Our courts have given effect to the latter alternative only. The daughter's son is now held to acquire an absolute title.

The position of all the second and third class *sapindas* before the *sakulyas* would be most anomalous.

Suppose A and B are two brothers. B dies leaving a son's son's son x, and a daughter's son y, or a son's daughter's son z; then A dies leaving no other heir but B's descendants. If the above order were to be accepted, then B's estate will descend to x to the exclusion of y or z: but the estate of his brother A will go to y or z to the exclusion of x.

I have explained to you how some of the *sakulyas* may come under the term *sapinda*. So, the above order would be opposed to this. Besides, the benefits conferred upon the 4th, 5th and 6th ancestors must, at least in one case, be taken to be superior. The paternal great-grandfather offers oblations to those ancestors only, yet admittedly he is preferred to the eight daughter's sons and the maternal relations.

The grandson's, the nephew's, the uncle's son's, and the grand-uncle's son's, daughter's sons are equal in degree respectively to their son's sons. But the former are *sapindas* and the latter *sakulyas*. Similarly, the maternal great-great-grandfather and his descendants are equal in degree to the paternal great-great-grandfather and his descendants. But the former are *sapindas* and the latter *sakulyas*. We shall have to prefer cognates to agnates of the same degree. It ought to be remarked that the maternal great-great-grandfather cannot confer any spiritual benefit whatever.

Hence it is clear that the analogy is entirely false and misleading, whereby some learned writers would, relying on the Full Bench ruling, introduce all the maternal *sapindas* in the order of succession in the same manner as those on the paternal side, dismissing, however, the mother

altogether from their mind, and leaving aside the various difficulties that present themselves to one considering the question in all its aspects.

It has already been remarked that when there is a competition between two relations equal in degree, one of whom is a cognate and the other an agnate, to prefer the cognate to the agnate would be opposed to every system of jurisprudence.

The Hindu law of inheritance, as it is, may not in many respects commend itself to Europeans, whose family organisation is different. Some of the educated natives also may feel it to be contrary to natural justice, and we too may endorse the same view. But nothing will be farther from truth than to mistake our own individual feelings for those of the Hindu community at large. Most of what we call natural, originate in acquired habits of thought. The feelings of a people are moulded and shaped by its peculiar manners, customs and institutions. What is suited to the feelings of an imaginative people may be perfectly unsuitable to an objective race. What is suitable to an agricultural or pastoral nation may be altogether unsuited to a commercial people. What is agreeable to a community in its infancy may be quite disagreeable to it in a later stage of development. In the infancy of a society when the government could not be strong, and the protection of life and property depended more upon the exertions of the members themselves, people are observed to live in groups. Persons connected by natural ties of birth continue to live together: and we find society composed of families. Society has been continuing in this stage longer in India than in any other country. Ritual and social rules, laid down upwards of three thousand years ago, are in most respects observed strictly to the present day. They again re-act upon the feelings of the people. Look to our marriage law: in order to preserve peace in families, it was ruled that two persons of different sexes, born in the same family cannot intermarry. This rule has the force of law even now, and no man of the twice-born classes can marry a girl of the same *gotra*, although their common ancestor may be distant by more than a hundred generations. But the rule was absolutely necessary when there was a local union of all the agnate families of the same *gotra*. The Hindus are an agricultural people adhering to their ancestral homes and fields, and guided by their ancient customs and usages. Daughters born in the family pass by marriage to strange families which, oftener than not, reside in different and distant villages. The feelings of two families allied by marriage are often very far from being amicable towards each other. Hence it was enjoined that distant villages are preferable; since the communication not being easy, causes of friction and disagreement between the two families would be lesser; and accordingly the word *duhita* (=daughter) is derived from *du*=*dur*=*dure* and *hita*, meaning one who is beneficial (*hita*) when living at a distant place (*dure*). Persons having grandsons by daughters are found to adopt sons. Seldom does a daughter come back to see her relations, and even when she comes, she is allowed but a few day to remain with them. She and her children, being thus out of sight, become out of mind; nor can fathers have any power over their married daughters and their children who live separate from them. While the agnate relations live together in

the same village assisting and sympathizing with each other on joyous as well as on mournful ocasions. How strong is the tie that binds the agnatic relations together, and how complete is the estrangement between cognates, will appear in a glaring light if you look to the rules of mourning. A man shall have to observe the same period of mourning on the death of an agnatic relation, male or female, who may be on the extreme verge of *sapinda* relationship extending to seven degrees, as he has to observe on the death of his own father; whereas a brother's daughter's son or a son's daughter's son is not required to observe the same even for a day. There are many and various other circumstances in our society and families, to account for the preference given by the Hindu Law to agnates. But things which present themselves often to us, are the very things which we least observe.

The feelings of the majority of the Hindus of Bengal seem to be against the introduction before the *sakulyas*, of the second and the third, classes of *sapindas*, other than those who are admitted on all hands to have a preferable position under the Dáyabhága, and who, in the later stage, under altered circumstances, have been thought so nearer and dearer in the estimation of the Hindus of Bengal. See the Preface to the second edition of the Dáyatattva where the reasons for the changes of law, introduced by Jímútaváhana are fully explained.

The law of inheritance can, by no means, be so framed as to suit the feelings of all persons of a community. It is therefore supplemented in every civilized country by the law of testamentary succession The people of the Lower Provinces of Bengal have now the power of devising their property by will. Those therefore that think the law of inheritance to be unsuited to their feelings are no longer fettered by its rules.

Inheritance is so important a branch of law, that it ought to be placed beyond the possibility of any doubt or dispute. It ought to be as simple and clear as possible. Anything ought to be deprecated that is calculated to throw any doubt upon the same.

CHAPTER X.

EXCLUSION FROM INHERITANCE, AND DIVESTING.

ORIGINAL TEXTS.

१। सर्वे हि धर्म्मयुक्ता भागिनो द्रव्यम् अर्हन्ति, यस्त्वधर्म्मेण द्रव्याणि प्रतिपादयति, ज्येष्ठोऽपि तम् अभागं कुर्व्वीत। तथा अपपात्रितस्य ऋक्थ-पिण्डोदकानि निवर्त्तन्ते। आपस्तम्बः।

1. All co-heirs, who are endued with religion, are entitled to the property; but he, who dissipates wealth by his vices, should bo debarred from participation, even though he be the first-born. So, of one who has

been excommunicated, the heritable right and connection through oblations of food and libations of water become extinct.—A'pastamba.

२। शास्त्रशौर्य्यार्थरहित-स्तपोविज्ञानवर्ज्जितः।

आचारहीनः पुत्रस्तु मूत्रोच्चार-समस्तु सः॥ वृहस्पतिः।

2. A son who is devoid of Sástras, prowess and good purposes, who is destitute of devotion and knowledge, and who is wanting in conduct, is similar to urine and excrement.—Vrihaspati.

३। सर्व्वे एव विकर्म्मस्था नार्हन्ति भ्रातरो धनं। मनुः, ९, २१४।

3. All those brothers. who are addicted to vice, lose their title to the inheritance.—Manu, ix, 214.

४। (अर्हति स्त्री) न दायं निरिन्द्रिया अदायाश्च स्त्रियो मता इति श्रुतेः। वौधायनः।

4. A woman is not entitled to the heritage; for, a text of the Revelation says,—"Females are devoid of prowess and incompetent to inherit."—Baudháyana cited in D.B., xi, vi, 11.

५। अनंशौ क्लीवपतितौ जात्यन्धबधिरौ तथा।

उन्मत्त-जड़मुकाश्च ये च केचिन् निरिन्द्रियाः॥ मनुः, ९,२०१।

5. An impotent person and an outcast are excluded from a share of the heritage, and so are those deaf-and-blind-from-birth, as well as madmen-idiots-and-the-dumb and any others that are devoid of an organ of sense or action.—Manu, ix, 201.

The words connected by hyphens are compound words in the original. Organs of action are five, namely, organ of speech, both hands, both feet, excretory organs, and generative organs; organs of sense are also five, namely, eyes or the organ of sight, ears or the organ of hearing, nose or the organ of smell, palate or the organ of taste, and skin or the organ of touch. These are called the *external* organs of sense; for, an *internal* organ of sense is admitted, and is named *manas* (=mind) which is the necessary channel of communication between the external organs of sense and the soul, and which accounts for the absence of simultaneous perception of the sensations on the five external organs, inasmuch as it is supposed to be atomic in size and incapable of conveying more than one sensation at the same time.

६। पितृद्विट् पतितः षण्ढो यश्च स्याद्-औपपातिकः।

औरसा अपि नैतेऽंशं लभेरन् क्षेत्रजाः कुतः॥ नारदः, १३, २१।

6. An enemy to his father, an outcast, an impotent person, and one who is addicted to vice (or excommunicated) take no shares of the inheritance even though they be legitimate: much less, if they be sons of the wife by a man appointed to raise issue on her.—Nárada, xiii, 21.

७ । मृते पितरि न क्लीव-कुष्ठ्युन्मत्त-जड़ान्धकाः ।
पतितः पतितापत्यं लिङ्गी दायांशभागिनः ।
तेषां पतितवर्ज्जेभ्यो भक्तवस्त्रं प्रदीयते ।
तत्सुताः पितृदायांशं लभेरन् दोषवर्ज्जिताः ॥ देवलः ।

7. When the father is dead an impotent person, a leper, a madman, an idiot, a blind man, an outcast, the offspring of an outcast, and a person wearing the token of a religious order are not entitled to a share of the heritage: food and raiment should be given to them, excepting the outcast: but the sons of such persons being free from similar defects, shall obtain their father's share of the inheritance.—Devala.

८ । क्लीवोऽथ पतित-स्तज्जः पङ्गुरुन्मत्तको जड़ः ।
अन्धोऽचिकित्स्य-रोगाद्याः भर्त्तव्याः स्युर्निरंशकाः ।
औरसाः क्षेत्रजा-स्त्वेषां निर्दोषाः भागहारिणः ।
सुतास्चैषां प्रभर्त्तव्याः यावद् वै भर्तृ-सात्-कृताः ।
अपुत्राः योषितस्चैषां भर्त्तव्याः साधुवृत्तयः ।
निर्व्वास्याः व्यभिचारिण्यः प्रतिकूला स्तथैव च ॥

याज्ञवल्क्यः २, १४१ १४३ ।

8. An impotent person, an outcast and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, and the like, are excluded from participation; but are to be maintained. But their sons, whether real legitimate or born of the appointed wife, are entitled to allotments, if free from defects; and their daughters must be maintained until they are provided with husbands; and their sonless wives conducting themselves aright, must be supported; but such as are unchaste should be expelled; and so indeed should those who are perverse.—Yájnavalkya, ii, 141-143.

EXCLUSION FROM INHERITANCE AND DIVESTING.

Exclusion not total.—From the foregoing texts it is clear that the persons that are excluded from participation of shares on partition are, with their wives and children, entitled to maintenance, save and except one who is degraded and excommunicated and his issue born after his degradation; so they cannot be said to be totally excluded from the inheritance.

Causes of exclusion.—It should be remarked that sex is a cause of exclusion; for, females are, as a general rule, excluded

from inheritance, save and except such as have been expressly enumerated as heirs. The other causes of exclusion are certain moral or religious, mental, and physical defects and deformities. They may be classified thus :—

Defects
- 1. Moral or religious
  - 1. Irreligion or renunciation of religion,
  - 2. Sins causing excommunication or degradation,
  - 3. Unchastity,
  - 4. Addiction to vice,
  - 5. Enmity to Father, Enmity to *propositus*,
  - 6. Adoption of religious order.
- 2. Mental ...
  - 1. Insanity,
  - 2. Idiocy.
- 3. Physical ...
  - 1. Blindness,
  - 2. Deafness,
  - 3. Dumbness,
  - 4. Lameness,
  - 5. Impotency,
  - 6. Leprosy, and
  - 7. Other incurable diseases.

Religious disability & excommunication, and Act XXI of 1850.— The renunciation of Hindu religion, and consequent excommunication are no longer causes of exclusion from inheritance, since the passing of Act XXI of 1850 which provides :—

"1. So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by the Royal Charter within the territories."

The language of this section, so far as it affects the Hindu law, shows that it relates to a person who had been born a Hindu, but has renounced the Hindu religion, or has been excluded from the communion of the Hindu religion, or has been deprived of caste: but its wording cannot apply to a person who is born a non-Hindu, although his father or mother might be a Hindu by birth, but had become a pervert from Hinduism before he was born. This Act removes the disability

of the person who renounces Hinduism; his non-Hindu descendants cannot claim any benefit under this Act.

A person who is from birth a non-Hindu cannot be subject to the personal law of the Hindus, and cannot therefore lay claim to a right which is conferred on Hindus by the Hindu law to which he is not amenable. Nor can a Hindu claim to inherit from a Mahomedan or a Christian; for, succession to their property is governed by the Mahomedan Law or the Succession Act respectively, neither of which applies to the Hindus.

But the Allahabad High Court has held that a person who is born a Mahomedan, his father having renounced the Hindu religion, is entitled to inherit his Hindu paternal uncle's estate, by virtue of the provision in the above Act XXI of 1850 :—*Bhagwant* v. *Kallu*, I.L.R., 11 A., 100. It is difficult to follow the argument set forth in the judgment.

Section 9, Regulation vii of 1832 provides,—"Whenever, therefore, in any civil suit, the parties to such suit may be of different persuasions, * * * the laws of those (Hindu and Mahomedan) religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity and good conscience; it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles."

This Regulation was enacted to be in force throughout the provinces subject to the Presidency of Fort William.

The preamble of Act XXI of 1850 recites this Regulation and says that "whereas it will be beneficial to extend the principle of that enactment (S. 9 of Reg. vii of 1832) *throughout* the territories subject to the Government of the East India Company, it is enacted as follows:—

Thus it will be seen that what was intended to be done by Act XXI of 1850, is to extend that to the whole of British India, which was in force only in the Presidency of Fort William.

Now, is it at all conformable to the principles of justice, equity, and good conscience to hold that the son born to a person after he had renounced Hinduism and become a Mahomedan or a Christian, is entitled to be heir of that person's

Hindu brother or other relations, when it is a notorious fact that they become totally excommunicated and estranged, and are no longer recognized as relations by the Hindus? For, it cannot but be admitted that inheritance is founded on the principle of natural love and affection, and no court of equity can hold the principle applicable to persons who are practically perfect strangers to each other.

Deprivation of caste, and Act XXI of 1850.—According to Hindu Law, persons who are guilty of certain heinous sins are considered degraded and deprived of caste, that is to say, they are deemed dead so far as their relations and caste-people are concerned, there being a complete cessation of all social intercourse as well as of the mutual right of inheritance.

Now, an important question arises for consideration, namely, whether Act XXI of 1850 was intended to remove the disqualification based upon deprivation of caste by reason only of change of religion? or irrespective of the same?

If the Act be read and construed by the light of its Preamble, there cannot be any doubt that deprivation of caste, owing only to change of religion, is what is intended by the Act to be declared as having no legal effect so as to affect the rights of a person changing his religion. The Act does not affect the principles of the Hindu moral law, and is operative only when there is a change of religion. This was the view taken by the Sudder Dewany Adawlut of Bengal, (Sudder decisions of 1858, p. 1891), differing from the contrary view taken by Sir Lawrence Peel (2 Taylor and Bell, 300); the latter view, however, is supported by the weighty opinion of Sir Barnes Peacock (14 W.R., O.J., 23).

But with the greatest deference to that eminent Chief Justice, it may be asked, was it the intention of the Legislature to do away with the disabilities imposed by Hindu law on persons guilty of gross moral offences? Are we to understand that religion and morality are to be utterly ignored by the Indian Legislature and the Indian Courts?

If that be so, then it cannot but be held that the whole Chapter of Hindu law on Exclusion from Inheritance, has been abolished by the above Act; for, the defects or deformities causing exclusion from inheritance are supposed and believed to be the consequences of sins committed in the past forms of existence; but if heinous sins perpetrated in the present life, which cause deprivation of caste and exclusion from inheritance, be taken to have no longer any legal effect in conse-

quence of the said Act, why then should similar sins committed in past forms of existence, and manifested and evidenced by the deformities, have the effect of excluding from inheritance the unfortunate persons affected thereby?

The Madras High Court appears to take the same view as the Bengal Sudder Dewany Court, namely, that the Act contemplates deprivation of caste by reason of change of religion. For, it has been held that as regards inheritance to the property left by dancing girls or prostitutes who are degraded from caste, their sister or adopted niece belonging to their fallen class succeed in preference to a brother remaining in caste: I.L.R., 12 M., 277; I.L.R., 13 M., 133.

It has also been held by the same court that marriage is dissolved by a Hindu husband becoming a Christian, which is tantamount according to Hindu Law, to becoming degraded and outcasted: I.L.R., 8 M., 169.

The Calcutta High Court also have followed these rulings and held that the general rule, that the tie of kindred between a woman's natural family and herself ceases when she becomes degraded and outcaste, applies with even greater force as between her and the members of her husband's family; the husband's sister's son, therefore, has no right of inheritance in property acquired by a woman who left her husband's family and became degraded by being a woman of the town: I.L.R., 21 C., 697.

It should, however, be remarked that in the case of deprivation of caste, also, the privilege conferred by this Act is only personal, as applying to the person who having been in the caste is deprived of it; it cannot apply to his descendants coming into existence after he has become an outcaste. For an outcaste is beyond the pale of Hinduism to whom the Hindu law cannot apply; and there cannot, in law, subsist any connection or relationship between the outcaste and those in caste. The outcaste is deemed dead and funeral ceremonies are performed for him, by his relations in caste, see Manu, xi, 183 *et seq.* But see *contra* I.L.R, 18 C., 264.

Unchastity—of woman is highly condemned, and it is admitted by all the schools to exclude the widow from inheriting her husband's estate; in fact a wife's right to be her husband's heir is founded on her fidelity and loyalty to him. It is her devotion to the husband that constitutes her to be the half of her husband, in which capacity she inherits his estate, and of which estate she becomes divested by giving up that character by re-marriage. An unchaste wife may be divorced by

the husband: thus, Manu cited in the Viváda-Ratnákara p. 426 (Calcutta Asiatic Society's Edition),—declares,—

स्वच्छन्दगा च या नारी तस्यास्त्यागो विधीयते ।
न चैव स्त्रीवध कुर्य्यात् न चैवाङ्गविकर्त्तनं ॥

which means—"If a woman is licentious, her abandonment is ordained; the woman, however, should not be killed, nor should her limbs be mutilated." Although unchastity and disloyalty before the husband's death would exclude the widow, unchastity subsequent to the husband's death will not divest the estate already vested in her:—*Moniram* v. *Keri*, I.L.R., 5 C., 776, affirming 19 W.R., 367. The latter proposition, however, is true only in a qualified sense, as will presently appear.

But there is a conflict of decisions with respect to the effect of unchastity of the daughter and the mother on their right of inheritance. The Allahabad, Bombay and Madras High Courts have held that neither the daughter nor the mother is excluded by reason of unchastity which, as a cause of disinherison, applies to the widow alone (*Ganga* v. *Ghasita*, I.L.R., 1 A., 46; *Advyapa* v. *Rudrava*, I.L.R., 4 B., 104; *Kojiyadu* v. *Lakshmi*, I.L.R., 5 M., 149). But the Calcutta High Court have held that the condition of chastity applies not only to the widow but also to the daughter (I.L.R, 22 C., 347, and I.L.R., 32 C., 87) and to the mother (I.L.R., 4 C., 550).

There is nothing, however, in the Dáyabhága in support of this view taken by the Calcutta High Court; and the reasoning by which that conclusion is arrived at, appears to be, as pointed out by the Madras High Court, disapproved by the Privy Council in the Unchastity case. It must not, however, be supposed that under the Dáyabhága the daughter or the mother is under no circumstances excluded from the inheritance by reason of unchastity even if it be of the gravest character. There are different grades of unchastity under Hindu law and a woman is certainly excluded, if her incontinence causes excommunication, or is followed by child-birth, as will presently be explained.

The chastity of the mother and the daughter is not required by any commentary, as a condition of their succession. The reasons assigned in the Dáyabhága for the mother's succession are the secular benefits received from her by the deceased, and her capacity to confer spiritual benefit by giving birth to other sons; but the existence of the second reason is not at all

necessary,—p. 349. As regards the daughter, her capacity to be mother of sons, and her descent from the *propositus*, are set forth as the reasons for her succession. Their unchastity does not prejudicially affect the spiritual welfare of the deceased, in the same way as that of the wife or the widow. The Vírami-trodaya (p. 190) appears to declare by necessary implication, that the mother's unchastity is no disqualification for inheritance :—see *supra* p. 287.

In the two cases before the Calcutta High Court, the two women concerned were not only unchaste but were also degraded and outcasted; and their exclusion could be justified on the latter ground, if Act XXI of 1850 be taken to remove the disqualification of being deprived of caste by reason only of renunciation of the Hindu religion. The Judges, however, avoided deciding that question.

Mere unchastity when not followed by conception or by loss of caste is an expiable and venial offence and cannot justify exclusion from inheritance, of female relations other than the wife whose case stands on a different footing altogether; for conjugal fidelity to the husband is of the essence of the notion of a wife and forms the foundation, and is the *sine qua non*, of her heritable right.

Parásara, who is said to ordain the law for this Kali age, declares—

रजसा शुध्यते नारी विकलं या न गच्छति ॥ ७,४ ।

सकृद् भुक्ता तु या नारी नेच्छन्ती पापकर्म्मभिः ।

प्राजापत्येन शुध्येत ऋतु-प्रस्रवणेन तु ॥ १०, २६ ।

जारेण जनयेद्गर्भं गतेऽव्यक्ते मृते पतौ ।

तां त्यजेद् अपरे राष्ट्रे पतितां पापकारिणीं ॥ १०,१० ।

which means,—"A woman (committing adultery) is purified by catamenia, provided she did not conceive (vii, 4). If a woman has committed adultery once, and is not desirous to commit that sinful act again, she becomes pure by *Prájápatya* rite and by the flow of the catamenia : (x, 26). If a woman becomes pregnant by her paramour when her husband is dead or is missing, she being a wicked and degraded woman should be carried to the territory of a different king and be abandoned there : (x. 20)." Thus it will be seen that there are different grades of unchastity : and the offence is an expiable one in light

cases. It should be noticed that a widow becoming pregnant by adultery must become deprived of her husband's estate by reason of the punishment of banishment inflicted on her.

Yájnavalkya also ordains the same rule :—

हृताधिकारां मलिनां पिण्डमात्रोपजीविनीं ।
परिभूताम् अधःशय्यां वासयेद् व्यभिचारिणीं ॥
सोमः शौचं ददौ तासां गन्धर्व्वाश्च शुभां गिरं ।
पावकः सर्व्वमेध्यत्वं मेध्या वै योषितो ह्यतः ॥
व्यभिचारात् ऋतौ शुद्धि गर्भे त्यागो विधीयते ।
गर्भभर्तृवधादौ च तथा महति पातके ॥ १, ७० ७२ ।

which means,—"A woman guilty of unchastity shall be deprived of her position and possessions, shall wear dirty clothes, shall live upon starving maintenance, shall be humiliated and made to sleep on bare ground. The moon has given them purity, the Gandarvas have given them sweet voice, the Fire-god has given them permanent sanctity, women are therefore always pure. A woman guilty of adultery is purified by catamenia; but her abandonment is ordained in case of conception by adultery, and in case of causing abortion or killing the husband, as well as in case of committing heinous sins :"— i, 70-72.

The above texts were not before the courts in the Unchastity case. They show that Unchastity alone is a light offence, it becomes very grave if followed by conception, and that then a widow's right to her husband's estate must cease.

It should be remarked that unchastity of women is not expressly enumerated in the Chapter on Exclusion, as a cause of exclusion from inheritance.

Unchastity, Prostitution, Degradation and Tie of kindred.— According to the Hindu law of moral and religious offences, a man becomes liable to be degraded and excommunicated for sinful acts of heinous character, and an outcaste or an excommunicated sinner is deemed civilly dead, so that exequial rites are directed to be performed for him in the same manner as if he were dead. A woman also is degraded for the same sinful offences, and specially for the heinous crimes set forth in the following texts,—

नीचाभिगमनं गर्भ-पातनं भर्तृहिंसनं ।
विशेष-पतनीयानि स्त्रीणामेतान्यपि ध्रुवं ॥ याज्ञवल्क्यः-३, २९८ ।

which means,—"Sexual intercourse with a low caste man, causing abortion of a child in her womb, and killing her husband: these are certainly additional causes of women's special degradation."—Yájnavalkya, iii, 298.

चतस्रस्तु परित्याज्याः शिष्यगा गुरुगा च या ।
पतिघ्नीच विशेषेण जुङ्गितोपगता च या ॥ वशिष्ठः—

which means,—"Four (descriptions of) women must be abandoned, namely, (1) one cohabiting with a pupil (of the husband), (2) one cohabiting with Guru (or father or father-in-law), (3) one cohabiting with a *chandála* or with a man of any other very low caste, and (4) specially one killing her husband."—Vasishtha.

चण्डालान्त्यस्त्रियो गत्वा भुक्त्वा च प्रतिगृह्य च ।
पतत्यज्ञानतो विप्रो ज्ञानात् साम्यन्तु गच्छति ॥ मनुः ११,१७६ ।

which means,—"A Bráhmana who has cohabited with a woman of the *chandála* or any other very low caste, or has eaten food (given by a person of such caste) or has accepted gifts (made by such person) becomes degraded, if he has done so through ignorance; but if with full knowledge, then he becomes their equal."—Manu, xi, 176.

These and similar texts show that a woman becomes an outcaste for adultery, only when it is committed with a man of a very low caste, and according to the Mitákshará, in case she refuses to perform the penance prescribed for the same.

A woman living in adultery with a man of equal or superior caste does not become an outcaste.

When a woman leaves her father's or husband's house where she was living, and goes away with a paramour and lives with him elsewhere, she is ordinarily called a *prostitute* by the Hindus, and as such is assumed to be degraded.

But this is a mistake; for, a woman can properly be called a prostitute or *vesyá*, if she sells her person for money to men of all castes and submits to their embrace; and such an unchaste woman becomes an outcaste, and is excluded from social intercourse, and the tie of kindred becomes severed.

According to the Mitákshará, even a person guilty of the most heinous sinful acts that cause degradation and excommunication, may be restored to social intercourse after due performance of the prescribed penance, except when it consists

of self-immolation of the sinner, although the sin itself may not be purged off when the sinful act is intentionally committed. The Mitákshará says that—द्वे हि पापस्य शक्ती नरकोत्पादिका व्यवहार-निरोधिका च—"A heinous sin, has twofold capacity (1) causing liability to go to hell, and (2) causing exclusion from social intercourse,"—and although the former cannot be removed when the sinful act is intentionally committed, the latter can be, and the sinner is restored to social intercourse after the performance of penance, by the force of the divine ordinance. But some other commentators read the ordinance differently, and maintain the opposite view, namely, that the liability to go to hell may be removed by penance, but not the exclusion from social intercourse.

A person becoming an outcaste in consequence of the commission of sinful acts most heinous in character, becomes also civilly dead, if he persists in the vicious course, and omits to perform penance, and his relations are enjoined to perform his exequial rites: so says Manu,—

पतितस्योदकं कार्य्यं सपिण्डै-र्बान्धवै-र्बहिः ।
निन्दितेऽहनि सायाह्ने ज्ञात्यृत्विग्-गुरु-सन्निधौ ॥
दासीघटम् अपां पूर्णं पर्य्यस्येत् प्रेतवत् पदा ।
अहोरात्रम् उपासीरन् अशौचं बान्धवैः सह ॥ मनुः, ११,१८३-४ ॥

"To an outcaste (libation of) water shall be offered (as if he were dead) by the *sapindas* and the *samánodakas*, outside (the village), on an inauspicious day, in the evening, in the presence of the agnates, the officiating priest and the preceptor of the Vedas. A female slave shall upset with her foot a pot filled with water, as if it were for a deceased person; for a day and a night impurity (or mourning) shall be observed (by the *sapindas* and) by the *samánodakas*.—Manu, xi, 183-4.

Yájnavalkya also ordains the same rites in Ch. iii, 295, and the Mitákshará says that this abandonment of an outcaste is to be made, if he refuses to perform the penance though required by his kinsmen.

It appears therefore that when a woman becomes an *outcaste* by reason of unchastity, and is deemed dead, the tie of kindred with her undegraded relations becomes severed. The conflict of decisions on this point appears to have arisen in consequence of the indiscriminate application of the term *prostitute* to all women guilty of unchastity, and of the mistake in

regarding them all to be *outcaste*. The tie of kindred can be deemed severed or not, according as the unchaste woman is outcaste and civilly dead or not, having regard to the nature and character of her unchastity. But this principle of distinction is not taken into consideration.—I.L.R., 25 C., 254; 6 L.J., 370; 23 M., 171; 29 A., 4; 21 C., 697; 7 Sel. Rep., 325.

Unchastity and Stridhanam.—It has been held that Unchastity does not exclude a Hindu woman from inheriting *Stridhan* property: *Nogendra* v. *Benoy*, I.L.R., 30 C., 521; *Angammal* v. *Venkata*, 26 M., 509. It does not seem to be correct to suppose that there is any distinction between a man's property and a woman's property, with respect to exclusion from inheritance, the causes for which apply to both. Incontinence followed by child-birth appears to debar the woman from inheritance, and to cause an inexpiable degradation and absolute excommunication from caste, as well as severance of relationship; so that she would no longer be recognised as a relation, the status of which is the foundation of inheritance. It operates as civil death.

Addiction to vice.—A man of vicious habits is excluded from inheritance. Under this head you may include unchaste women. But if you exclude females on that ground, you must disinherit also males who dissipate wealth in wine and women, or by gambling. There is, however, no reported case in which a male has ever been excluded on account of vice, though instances are unfortunately too frequent, of young men inheriting property, being led astray to a vicious course of life by designing and unprincipled people.

Enmity to the father.—The father is so great a benefactor of the son, that the Hindu law requires a son to respect the father the author of his being, as a God; in fact the idea of father is associated with the idea of the Creator of all beings, or God the Father. A son who does not respect his father is highly censured: and a son who is habitually inimical to his father and beats him or otherwise ill-treats him is excluded from inheritance, as being an ungrateful wretch and heinous sinner, and as such, unworthy of having the status of son.

Enmity to Propositus.—It should be borne in mind that in the Hindu law of inheritance what in terms applies to father and son, is intended to be applicable to any two relations, one of whom becomes heir to the other: the son being the prior heir, rules of general application are often laid down in terms

that apply only to father and son. For instance, Partition of Heritage is defined by Nárada as "the division of the *paternal* property by the *sons*: Mit., i, i, 5; D.B., i, 1.

Similarly the term *pitri-dvit* or "enemy to the father" used by Nárada and the commentators may be taken to be intended to apply to any relation who is inimical to the person whose heir, he would otherwise be entitled to become, in the circumstances. The term is not explained in many commentaries. But the two principal commentaries of the Mithila school explain the term:—the Viváda-Ratnákara says—पितरं यो द्वेष्टि स पितृद्विट्, द्वेषश्च पितरि जीवति मारणादिफलः, मृते तु तदुद्देशेनोदकाद्यदानरूपः,—"He who is inimical to the father is enemy to the father, and the enmity when the father is alive, is such that its result is killing or the like, and when he is dead it consists of non-offering of libations of water and the like to him": and the Viváda-Chintamani says,—पितृद्विट् पितरि जीवति तत्ताड़नादिकृत्, मृते तच्छ्राद्धादिविमुखः—"The father's enemy is one who, when the father is alive, ill-treats him by beating or the like, and when he is dead, is averse to the performance of his Sráddha and the like."

Hence a participator in a murder is not entitled to inherit the estate of the person murdered by himself, or with his aid, or at his instigation.

The Madras High Court, however, appears to take the term *pitri-dvit* or *father's enemy* in its primary sense, and accordingly holds that the question whether a Hindu who has been a party to a murder is excluded from inheriting the estate of the murdered person, is not answered by the Hindu law. But it is submitted that the case under their Lordships' consideration may for the foregoing reasons be held to be included under that term in its secondary meaning, namely, "*enemy* to the *propositus*."

Their Lordships, however, held, having regard to equity, justice and good conscience, that the principle that no one shall be allowed to benefit by his wrongful act is of universal application: hence a party to a murder is not entitled to any beneficial interest in the estate of the person murdered, although the vesting of it in him by inheritance is not prevented: *Vedanayaga* v. *Vedammal*, I.L.R., 27 M., 591; 31 M., 100.

Adoption of religious order.—Entrance to a religious order is tantamount to civil death so as to cause a complete severance of his connection with his relations, as well as with his property, inheritance to which opens on his renouncing the world by the adoption of a religious order; any property

which may be subsequently acquired by persons adopting religious orders passes to their religious relations. Such persons might be of three descriptions, namely, (1) *Naishthika Brahmachári* or life-long student, (2) *Vánaprastha* or retired to a forest, meaning one adopting the third order or stage of retired life for religious purpose, (3) *Bhikshu* or *Jati* or *Sannyási* or one who renounces the world and becomes a religious mendicant. The adoption of the first two orders is included under practices to be avoided in this *kali* age, see *supra* p. 9; persons of the last description are still found, who renounce all worldly concerns and cut off all connection with their relations; and they are excluded from inheritance.

But the renunciation must be complete and not nominal only, as in the case of persons entering the *Vaishnava* sect in lower Bengal, called *Byragis* by name, but who do not mean thereby to renounce worldly affairs and relinquish property. Such a *Byragi* is not excluded from inheritance (*Teeluk* v. *Shamma*, 1 W.R., 209,) and his property passes on his death to his ordinary relations,—10 W.R., 172; 15 W.R., 197.

Idiocy.—In the Dáyabhága (Ch. v, 9) *jada* or an idiot is defined to be a person not susceptible of instruction. It is a congenital and incurable mental infirmity arresting development of the intellectual faculties: the onus lies on the party asserting the existence of the disqualification: *Surti* v. *Narain*, I.L.R., 12 A., 530.

Insanity—is a disease of the mind, which need not be congenital nor incurable to exclude from inheritance the person affected thereby at the time the succession opens: *Wooma* v. *Giris*, I.L.R., 10 C., 639; *Deo* v. *Budh*, I.L.R., 5 A., 509.

A member of a joint family governed by the Mitákshará, will be precluded from participating a share as co-parcener if at the time of partition, he is affected by insanity, although he was free from that disease before, and did acquire a right to the ancestral property from his birth: *Ram* v. *Lalla*, I.L.R., 8 C., 149; and *Ram* v. *Ram*, I.L.R., 8 C., 919.

He is therefore divested of a vested right, and thus it is apparent that the strict rule of vesting and divesting does not apply to a Mitákshará joint family; and it follows therefore that if the malady is cured after partition, he would be entitled to a share by re-opening partition, like a posthumous son. But the Allahabad High Court has held that subsequent insanity does not divest a co-parcener, of the interest vested in him by birth: *Tribeni v. Mahammad*, I.L.R., 28 A., 247.

Defects of external organs of sense and of action.—Blindness and deafness must be congenital, according to Manu: and it follows *a fortiori* and by necessary implication, that the defects of other organs, namely, dumbness, lameness, impotency and the like must be of the same character, *i.e.*, congenital. If the defects of the two principal organs of seeing and hearing, cannot disinherit, when they arise subsequently to birth (1 B, 557); why then should the defect of a minor organ, exclude from inheritance, if it be not congenital? Otherwise, the accidental loss of a limb or organ of action, as in the case of a soldier and hero, may have the effect of exclusion. It has been held that lameness must be congenital to exclude from inheritance: I.L.R., 26 M., 133.

It appears to be necessary that these defects must also be incurable: 23 W.R., 78 (blindness); I.L.R., 1 B., 177; I.L.R., 18 C., 327 (dumbness).

Leprosy and other incurable diseases.—Leprosy may be taken as a defect of the organ of touch. It need not be congenital; but it appears that it should be incurable: *Ananta* v. *Rama*, I.L.R., 1 B, 554. It must assume a virulent and aggravated type, in order to operate as a cause of exclusion from inheritance: I.L.R., 19 M., 74. It is not easy to determine what other incurable diseases will be held to be disqualifications for inheritance, but the strictest proof of the disease must be given: 2 W.R., 125; 21 W.R., 249.

Disqualification personal.—If the person affected by a disqualification, has a son or other descendant of his body, who would by right of representation take his place and inherit in case he were dead, then such a descendant will, if he is himself free from similar defects, inherit, notwithstanding the exclusion of his father or other ancestor. Thus a son of a blind person, if not affected by any disability, is entitled to succeed to his grandfather's property, notwithstanding the exclusion of his father. So in Bombay the wife of a disqualified person is not excluded from inheritance: (*Gangu* v. *Chandra* I.L.R., 32 B., 275). This rule, however, does not apply to a son born to an outcast after his degradation; nor to a son adopted by a disqualified person; nor to a son of a disqualified brother or other collateral, when there is another brother or collateral of the same degree, free from defects, as right of representation does not apply to collaterals.

Cure of defect, after-born son, and divesting.—But if there be no such son or descendant in existence at the time when

the succession opens, but comes into existence afterwards, then such a son is not entitled to take by divesting the heir in whom the succession has already vested. It has been so held by a Full Bench of the Calcutta High Court in the blindman's son's case of *Kalidas* v. *Krishan*, 2 B.L.R., F.B., 103 = 11 W.R., O.J., Ap. 11, governed by the Bengal school. See also *Pawadewa* v. *Venkatesh*, I.L.R., 32 B., 455, in which it has been held that even the widow is not divested by a son of a disqualified son, born subsequent to her succession.

Nor will the removal of the defect subsequent to the opening of the inheritance, entitle the affected person to claim the heritage by divesting the person in whom it already vested.

But this rule cannot apply to Mitakshara joint family.—The Mitákshará deals with the subject of exclusion in connection with the partition of joint property; it does not require any defect to be congenital; if the disqualification arises before partition, it will cause exclusion of the affected person; if again the disqualification is subsequently removed, he will be entitled to take his share by re-opening the partition, like a posthumous son: Mit. 2, 10, 6-7. I have already observed that the strict rule of vesting and divesting cannot apply to a Mitákshará joint family; for, vesting and divesting continually go on in such a family by births, adoptions, and deaths. How else could a person becoming insane after birth but before partition, be excluded from participating a share of the ancestral property in which he had acquired an interest from his birth?

Accordingly in a case where one of two brothers died leaving a deaf and dumb son, and afterwards a son was born to the latter, it has been held by the Madras High Court that this after-born grandson is entitled to take his grandfather's undivided co-parcenary interest which may be said to have passed on his death by survivorship to his brother's descendants, subject, however, to the charge of the maintenance of the disqualified son and his family: *Krishna* v. *Sami*, I.L.R., 9 M., 64. The Madras High Court followed the principle underlying the case of *Roghunada* v. *Brojo Kisor*, I.L.R., 1 M., 69 = 3 I.A., 154, in which the last holder of an impartible estate died leaving a widow authorized to adopt a son, and an undivided brother in whom the estate vested by survivorship to the exclusion of the widow who subsequently adopted a son, and it was held by the Judicial Committee that this adopted son was entitled to take the estate by divesting his uncle.

It should be borne in mind that the ancestral property of a Mitákshará joint family is really vested in the family and not in the individual members thereof, although it is possible that at a particular time one member alone possesses the right of alienation over it for family purposes. It is quite erroneous to suppose in either of the above two cases that the family property was *absolutely* vested in the surviving brother or brother's son, when the maintenance of the disqualified son and the female members is a charge upon the property, and those among the latter, that are wives or widows of male members, are co-owners in a subordinate character.

The English lawyers create a confusion in Hindu law by introducing the distinction of legal and equitable estates and charges. It has already been observed that in Hindu law a person is deemed to have ownership in immoveable property when he is entitled to any benefit arising out of the same: *ante* pp. 208-9.

If a man may become divested of half the ancestral estate by the birth of a son to him, where is the incongruity if he be divested of the same half by the birth of a son to his disqualified nephew who also has an interest in the estate from which he gets his maintenance.

But in a case similar to the above Madras case, the Bombay High Court has taken a contrary view by holding that a grandson born after the death of the grandfather, to his deaf and dumb son is not entitled to take the undivided moiety of the grandfather, which passed by survivorship to the latter's surviving brother and his son: *Bapuji* v. *Pandurang*, I.L.R., 6 B., 616.

It should, however, be remembered that properly speaking, the undivided co-parcenary interest of a deceased member does not really pass to any body, but simply lapses; no survivor acquires on his death any right to the family estate, which he had not before. No question of shares arises so long as the family remains joint; in this case, there were the surviving brother and his son forming a joint family, of which the deaf and dumb person also was a member, and when a son was born to the disqualified member, he also became a member of the joint family; and there is no reason why he should not get a share on partition of the property of the family of which he is a member. The Hindu law says that "their sons if free from defects shall get their shares," out of the hereditary source of their maintenance. The operation

of this equitable rule cannot be restricted, unless there be equitable considerations of a different kind.

Maintenance.—Excepting the outcaste, the disqualified persons are not really excluded from inheritance, but they do not get shares on partition of the family property, while they and their wives and children are entitled to get maintenance out of the property.

It should be observed that agriculture is the chief source of wealth of the people of this country, and the ancestral fields form the productive property of families. But the infirmities causing the so-called exclusion from inheritance, incapacitate the persons affected thereby for carrying on the cultivation of their shares of the land. Hence what the Hindu law seems to provide, is, that their shares should be in the possession of the other members who must furnish them and their family with maintenance, and defray the expenses of the marriage of their daughters. So these disqualified persons enjoy the rights of a co-sharer so far as their necessary expenses are concerned; and thus the Hindu law is not really hard on those to whom nature has been so unkind.

Of excluded females.—According to both the schools of Hindu law, a woman becomes *sapinda* in the sense of blood relation, of her husband and of his relations, and also becomes a member of his *gotra;* accordingly, if there had not been the general rule excluding females from inheritance (Text No. 4), a woman would have been an heir of her husband's relations in the same way as in Bombay. The rule that persons who are excluded for causes other than degradation, are nevertheless entitled to maintenance (Texts Nos. 7 and 8), applies also to women that are excluded by reason of their sex, or any other cause of disqualification other than degradation. The text of Baudháyana, ordaining the exclusion of women, is cited in the Viváda-Ratnákara, Ch. v, in which Exclusion from Inheritance is discussed. In that chapter are cited the texts of Manu, Vishnu, Yájnavalkya, Nárada, Devala and Baudháyana, providing maintenance for all the excluded relations. In the Víramitrodaya (p. 244), it is expressly declared that the daughter-in-law is excluded from inheritance of the mother-in-law's *Strídhana,* by reason of her sex, but is entitled to maintenance. Hence, a sonless widowed daughter, who is according to the Dáyabhága excluded from inheriting her father's estate, is certainly entitled to maintenance. But see *contra* I.L.R., 27 C., 555, in which all the authorities do not seem to have been placed before the court.

The onus of proving disqualification—lies on the person who seeks to exclude one who would be an heir, should no cause of exclusion be established, (*Futtick* v. *Juggut*, 22 W.R., 348), the presumption of Hindu law being against disqualification: *Chunder* v. *Kristo*, 18 W.R., 375.

CHAPTER XI.

MAINTENANCE.

ORIGINAL TEXTS.

१ । मणि-मुक्ता प्रवालानां सर्व्वस्यैव पिता प्रभुः ॥
स्थावरस्य समस्तस्य न पिता न पितामहः ॥ याज्ञवल्क्यः ॥

1. The father is master of all of the gems, pearls and corals; but neither the father nor the grandfather is so, of the whole immoveable property.—Yájnavalkya.

२ । ये जाता येऽप्यजाता वा ये च गर्भे व्यवस्थिताः ।
वृत्तिं तेऽपि हि काङ्क्षन्ति वृत्तिलोपो विगर्हितः ॥ मनुः ॥

2. They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require means of support; the dissipation (of their hereditary source) of maintenance is highly censured.—Manu cited in D.B., i, 45.

३ । भरणं पोष्यवर्गस्य प्रशस्तं स्वर्गसाधनं ।
नरकं पीड़ने चास्य तस्माद् यत्नेन तं भरेत् ॥ मनुः ॥

3. The support of the group of persons who should be maintained, is the approved means of attaining heaven; but hell is the man's portion if they suffer: therefore he should carefully maintain them.—Manu cited in D.B., ii, 23.

४ । पिता माता गुरुभार्य्या प्रजा दीनाः समाश्रिताः ।
अभ्यागतोऽतिथिश्चैव पोष्यवर्ग उदाहृतः ॥ मनुः ॥

4. The father, the mother, the Guru (an elderly relation worthy of respect), a wife, an offspring, poor dependants, a guest, and a religious mendicant are declared to be the group of persons who are to be maintained.—Manu, cited in Srikrishna's commentary on the Dáyabhága, ii, 23.

५ । वृद्धौ च माता पितरौ साध्वी भार्य्या सुतः शिशुः ।
अप्यकार्य्य-शतं कृत्वा भर्त्तव्या मनुरब्रवीत् ॥ मनुः ॥

5. It is declared by Manu that the aged mother and father, the chaste wife, and an infant child must be maintained even by doing a hundred misdeeds.—Manu, cited in the Mitákshará while dealing with gifts.

६ । न माता न पिता न स्त्री न पुत्रस् त्यागम् अर्हति ।

त्यजन्नपतितान् एतान् राज्ञा दण्ड्यः शतानि षट् ॥ मनुः, ८, ३८९ ॥

6. Neither mother, nor father, nor wife, nor son, deserves abandonment: one abandoning these when not degraded (or outcasted for commission of any heinous sin), shall be punished by the king six hundred (Panas).—Manu, viii, 389. Abandonment is explained by commentators to mean refusal to maintain, and in the case of parents, also to serve and attend.

७ । पितापुत्र-स्वसृभ्रातृ-दम्पत्याचार्य्यशिष्यकाः ।

एषाम् अपतितान्योन्य-त्यागी च शतदण्डभाक् ॥ याज्ञवल्क्यः, २, २३७ ॥

7. Father and son, sister and brother, wife and husband, and preceptor and pupil; of these one forsaking the other if not outcasted, deserves the punishment of (the fine of) one hundred (Panas).—Yájnavalkya, ii, 237.

८ । स्वं कुटुम्बाविरोधेन देयं । याज्ञवल्क्यः, २, १७५ ।

8. Property other than what is required for the maintenance of the family, may be given.—Yájnavalkya, ii, 175.

९ । पुत्रान् उत्पाद्य संस्कृत्य वृत्तिञ्चैषां प्रकल्पयेत् ।

9. A father shall perform the purificatory ceremonies for his sons, and provide them with a source of maintenance.—Mitákshará.

१० । मृते भर्त्तर्य्यपुत्रायाः पतिपक्षः प्रभुः स्त्रियाः ।

विनियोगेऽर्थरक्षासु भरणे च स ईश्वरः ॥

परिक्षीणे पतिकुले निर्मनुष्ये निराश्रये ।

तत् सपिण्डेषु चासत्सु पितृपक्षः प्रभुः स्त्रियाः ॥ नारदः ॥

10. When the husband is dead the husband's side (kin) is the guardian of his sonless wife: in disposal of property, in protection of the wealth, and as regards her *maintenance*, he has full power: if the husband's family be extinct or destitute of male member, or helpless, and there be no *sapinda* of his, then the father's side (kin) is the guardian of the widow.—Nárada cited in D.B., xi, i, 64.

११ । पितृव्यगुरुदौहित्रान् भर्तुः स्वस्रीय-मातुलान् ।

पूजयेत् कव्यपूर्त्ताभ्यां वृद्धानाथातिथींस् स्त्रियः ॥ बृहस्पतिः ॥

11. (A widow inheriting her husband's estate) should honour with food and presents (for their benefit), the husband's paternal uncle, (and

the like) venerable elderly relation, daughter's son, sister's son, and maternal uncle, as well as aged and helpless persons, guests and females (of the family).—Vrihaspati cited in D.B., xi, i, 64.

MAINTENANCE.

Two-fold liability for maintenance.—A person's liability to maintain other persons, is of two descriptions: one is limited by his inheritance of the ancestral and other property, while the other is absolute and independent of such property, and is determined by certain relationship: *Savitri* v. *Luxmi*, I.L.R., 2 B., 573, 597.

Absolute liability.—A man is bound to maintain his aged parents, his virtuous wife, and his minor children, (Text No. 5) whether he inherited any property or not. He is also bound to support his infant illegitimate child: see Criminal Procedure Code, Section 484, and *Ghana* v. *Mt. Gerela*, 13 W.N., 150.

Liability limited by inherited property.—The ancestral immoveable property is the heriditary source of maintenance of the members of the family, and the same is charged with the liability of supporting its members, all of whom acquire a right to such property from the moment they become members of the family, by virtue of which they are at least entitled to maintenance out of the same: see *supra*, p. 208 *et seq*.

The ancestral property cannot be sold or given away except for the support of the family: a small portion of the same may be alienated, if not incompatible with the support of the family: D.B., 2, 22-26.

There is no difference between the two schools as regards the view that the ancestral property is charged with the maintenance of the members of the family, and that no alienation can be made, which will prejudicially affect the support of the group of persons who ought to be maintained:—Text No. 4.

Hence, although according to the Bengal School a son does not acquire a right to ancestral property, co-equal to that of the father, and is not therefore competent to enforce a partition of the same against the father, yet the father is not absolute master of the same, so as to be competent to alienate it and deprive the son and other members of the family, of their source of maintenance.

This is the view which is propounded in the second chapter of the Dáyabhága, but it should specially be borne in mind that the said view has been departed from by our courts of

justice, who hold that there is no distinction between ancestral and self-acquired property as regards the father's right of disposal over the same. But still this modern development of law cannot affect the question of the son's right of support from ancestral property so long as it has not been actually disposed of.

Persons entitled to maintenance from ancestral property.—According to the true view of Hindu law, and to the exigencies of Hindu society, as well as to Hindu feelings, the persons that are entitled to maintenance from ancestral and inherited property, are—

1. All male members of the family, including those that are excluded from inheritance.
2. Their wives or widows.
3. Their unmarried daughters.
4. Their married or widowed daughters when they cannot get maintenance from their husband's family.
5. The dependent members or the poor relations whom the deceased proprietor used to maintain, *i.e.*, helpless indigent relations who did actually depend on him for their livelihood, if sufficient property has been left by him.

As regards the Mitákshará school there is no doubt as to the right of the persons under heads 1, 2 and 3, to maintenance out of ancestral property.

In the Bengal school, however, a doubt may be raised as to the right of an adult son and consequently of his wife or widow and daughter. But it should be remembered that the Hindu law makes provision for the maintenance of even an illegitimate son.

Adult sons, daughters-in-law, and the like.—We have already seen that adult sons and their wives and children are entitled to maintenance from the ancestral property in both the schools.

Under the Mitákshará the daughter-in-law does, in right of her husband, acquire a right to the ancestral property, since her marriage, in fact she becomes her husband's co-owner in a subordinate sense, (*Jumna* v. *Machul*, I.L.R., 2 A., 315); and the principal legal incident of this co-ownership is the right to maintenance, which cannot be defeated by gift or devise made by the holder of such property : *Becha* v. *Mothina*, I.L.R., 23 A., 86. It has already been observed that there is no valid reason for the extinction of this co-ownership on the husband's death, the subordinate character of which must then be taken to be relatively to that of the surviving male members who stand in the husband's shoes as her legal guardian. But her

right to maintenance against the surviving co-parceners is taken to depend not on her co-ownership, but on the obligation imposed on them to maintain the widow of a deceased co-parcener: I.L.R., 22 C., 410; 31 M., 338.

It is to be now considered whether they are entitled to claim maintenance from the father's self-acquired property. It should be observed that the Mitákshará recognizes the right by birth, of the son and the like male descendant, to even the self-acquired property of the father and the like. This right is a subordinate right like that of the wife, and is recognised for the self-same reason, namely, enjoyment by sons, of father's property: hence sons must be held entitled to claim maintenance from such property. The Bengal School, however, does not admit right by birth. But it has been held that there is no difference between the two schools as regards the daughter-in-law's right to claim maintenance from the father-in-law who has only self-acquired property: 6 W.N., 530.

If we look to the actual usage even now prevailing in Hindu society, we find that the sons continue to live with their fathers even after attaining majority and also after marriage, and to be supported by them, when not earning anything. In fact it is the father who celebrates the son's marriage, the son being merely a passive agent in the transaction, the father decides whether the son should marry, and it is he who selects the bride, and it is he who settles the terms with the bride's father. After marriage the bride comes to her "father-in-law's house," and not to her "husband's house." A man consents to give his daughter in marriage, when he is satisfied that her *father-in-law* is possessed of means so as to be able to support her. Can there be any doubt that under the foregoing circumstances the father-in-law is bound to support her and the children born of her?

Although the general usage of the Hindu fathers' maintaining their adult sons, and the fact of a particular son's being always maintained from his birth by his father, would not create a legal liability of a father for furnishing adult sons with maintenance out of his self-acquired property; yet there are strong equitable considerations arising from his conduct, which tend to fix him with a legal liability to maintain that son's wife and children; for, there is an implied, if not an express, contract on his part, with the infant bride's guardian, that he will support her, the bridegroom being unable at the time of his marriage even to maintain himself.

But this aspect of the question, arising out of the actual usage of marriage among Hindus, appears to have been not placed before, nor taken into consideration by, the Courts, while dealing with it. It has therefore been held that there is only a moral obligation on the father-in-law to maintain his widowed daughter-in-law, out of his self-acquired property, which however ripens after his death into a legal obligation on the inheritor of his property; *Siddesury* v *Jonardan,* 5 W.N., 549; 6 W.N., 530. But it has been held by the Bombay High Court that she cannot claim it against the universal legatee of her father-in law's whole self-acquired property: *Bai* v. *Tarwadi,* I.L.R., 25 B., 263. The Madras High Court, however, holds that her legal right is not affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide the maintenance: *Rangammal* v. *Echammal,* I.L.R., 22 M., 305.

But a widowed daughter-in-law who left her "father-in-law's house" without any just cause, has been held to be not entitled to claim separate monetary maintenance from her father-in-law, to be enjoyed by her while living in her "father's house," the "father-in-law's house" being the proper place of residence for a married or a widowed woman; (*Khetra* v. *Kasi,* 10 W.R., 89 = 2 B.L.R., 15) except when the father-in-law is in possession of ancestral property in which her husband had an interest: *Surampalli* v. *Surampalli,* I.L.R., 31 M., 338.

The debt incurred by a Hindu widow in possession of her husband's estate to celebrate the marriage of the daughter of a son who had died before his father, has been held to be a valid charge on the estate passing to the reversioner after the widow's death: *Ramcoomar* v. *Ichamayi,* I.L.R., 6 C., 36.

It follows therefore that her maintenance is also a charge on her grandfather's estate.

Wife and widowed wife.—According to both the schools, the lawfully wedded wife acquires from the moment of her marriage, a right to the property belonging to the husband at the time, and also to any property that may subsequently be acquired by him, so that she becomes a co-owner of the husband, though her right is not co-equal to that of the husband, but a subordinate one, owing to her disability founded on her status of perpetual or life-long tutelage or dependence: I.L.R., 2 A., 315; 23 A., 86; 5 B., 99; 15 C., 304. I have already pointed out the reason why this right is recognized, see *ante* p. 215.

This right subsists even after the husband's death, although

her husband's rights as distinguished from hers may pass by survivorship or by succession to sons or even to collaterals; these simply step into the position of her husband, and she is required by Hindu law to live under their guardianship after her husband's death. The reason for recognizing her right continues even after the husband's death. The inferior dependent status of her sex prevents her from taking the husband's interest by survivorship. While she is the surviving half of her husband's body, a male issue is his consubstantial; and in a joint family, the female members occupy an inferior position, and must live under the protection and guidance of the male members; but their interest in the family property remains unaffected by the husband's death.

There are, however, a remark in the Dáyabhága (xi, i, 27) and another in the Víramitrodaya (p. 165), which are made for meeting an adverse argument, and which may mislead the reader to think that the right is extinguished by the husband's death, but which are not intended to be taken as the correct doctrine. Jímútaváhana maintains that the widow is entitled to inherit her husband's estate in preference to his undivided brethren, who are according to the Mitákshará *joint tenants* with the deceased, and are therefore entitled to take by survivorship to the exclusion of the widow. The Dáyabhága does not admit joint-tenancy of co-heirs, but maintains that they take as tenants-in-common, and that therefore survivorship does not apply (xi, i, 26). But the author of the Dáyabhága proceeds further, and controverts the Mitákshará doctrine of survivorship even assuming the joint-tenancy of co-parceners, by putting forward the argument that the wife was also a co-owner of the husband, and is therefore entitled to take by survivorship; hence, she cannot be excluded even on that ground by the husband's undivided brethren (xi, i, 27). But then an objection might arise to this argument, namely, that why should not the widow take by survivorship to the exclusion of the male issue. This is obviated by the author by saying that, in that case her right might be *inferred* to be extinguished by the death of the husband, because there are express texts providing the succession of the male issue to the exclusion of the widow. But it should be observed that the only inference that legitimately arises, is not the extinction of her co-ownership, but the extinction of only one of its incidents, namely, taking by survivorship, and that is what is really contemplated by the author; since he asserts that

there is no authority for the position that the wife's right in the husband's property accruing to her from their marriage ceases on his death: xi, i, 26.

And it should also be noticed that the whole of this is merely an argument against the Mitákshará doctrine of survivorship excluding the widow, even assuming the correctness of the theory of joint-tenancy upon which the same is based. And therefore the last assumption of the extinction of her right is not the author's own view of the nature of the wife's co-ownership: D.B., xi, i, 26.

The Víramitrodaya again while controverting the Dáyabhága doctrine of the widow's succession in all cases, takes advantage of the last assumption made by Jímútaváhana, and maintains that the widow's right to her husband's property, accruing from marriage, must be taken to be extinguished in all cases, by the death of the husband, so as to disentitle her to take by survivorship in any case. But this assumption is not at all necessary to be made, nor is there any authority in support of it; for the continuance of the widow's subordinate right is perfectly consistent with the right of the coparceners by survivorship, as it was with the right of the husband himself.

Besides, it is contrary to the reason for recognizing this right, and contrary to the Mitákshará itself (on Yájnavalkya, ii, 52), and to its fundamental doctrine, namely, that partition cannot create any right, but proceeds upon the footing of pre-existing rights, and that it is by virtue of the wife's right to the husband's property, that she obtains a share even when partition is made by her sons after the husband's death, and that it is by virtue of this right that she continues to enjoy the family property so long as it remains joint after the husband's death.

Hence, according to both the schools, the right which a woman acquires to her husband's property subsists after his death, whether his interest passes by succession or by survivorship to the male issue or any other person.

It has already been said (p. 114) that the wife is bound to reside with the husband; she cannot claim separate maintenance except for such ill-treatment as would amount to cruelty in the estimation of an English Matrimonial Court: *Matangini* v. *Jogendra*, I.L.R., 19 C., 84. But if the husband refuses to receive the wife into his house without sufficient cause, she is entitled to separate maintenance: *Nitye* v. *Soondar*, 9 W.R., 475.

But it has been held that a *widow* is not bound to live in her husband's house, though undoubtedly it is the proper place for her to reside, which she cannot be permitted to leave for unchaste purpose and retain her maintenance: *Goki* v. *Lakhmidas*, I.L.R., 14 B., 490; 20 W.R., 21; 29 C., 557; *Surampalli* v. *Surampalli*, 31 M., 338.

A widow, however, whose husband has directed that she shall be maintained if living in the family or any other specified house, is not entitled to maintenance if she resides elsewhere without just cause; *Giriana* v. *Honama*, I.L.R., 15 B., 236; *Bhaba* v. *Peary*, I.L.R., 24 C., 646; *Promotha* v. *Nagendrabala*, 12 W.N., 308.

An unchaste wife or widow is not entitled to any maintenance from the husband or his heirs respectively. That the husband's successors, taking his estate by survivorship, descent or devise, are not bound to maintain his unchaste widow, is a proposition which is beyond all doubt: *Roma* v. *Rajani*, I.L.R., 17 C., 674.

It has, however, been held that unchastity cannot affect the right of a widow to whom the income of certain property was assigned by her brother-in-law under an agreement compromising a suit by her against him, when there was no express stipulation about chastity: *Bhup* v. *Lachman*, I.L.R., 26 A., 321.

It has also been held by the Allahabad High Court that when re-marriage is permitted by the customary rule of a caste, it does not disentitle a widow from recovering maintenance charged by a decree against the husband on his property: *Gajadhar* v. *Kaunsilla*, I.L.R., 31 A., 161. This view appears to be contrary to the interpretation put by the Calcutta and the Madras High Courts on section 2 of the Hindu Widows Re-marriage Act, though it is consistent with the construction put on it by the Allahabad High Court: I.L.R., 19 C., 289; 22 C., 589; 1 M., 226; 11 A., 330.

The provision, made by Hindu law, for starving maintenance of an unchaste but penitent wife, is only a moral injunction on the husband; for, it has already been observed that the husband is competent to divorce an unchaste wife: p. 365 *supra*.

When the husband is alive, he is personally liable for the wife's maintenance, which is also a legal charge upon his property, this charge being a legal incident of her marital co-ownership in all her husband's property. But after his

death, his widow's right of maintenance becomes limited to his estate, which, when it passes to any other heir, is charged with the same. There cannot be any doubt that under Hindu law the wife's or widow's maintenance is a legal charge on the husband's estate; but our Courts appear to hold in consequence of the proper materials not being placed before them, that it is not so by itself, but is merely a claim against the husband's heir, or an equitable charge on his estate; hence the husband's debts are held to have priority: *Jayanti* v. *Mangamma*, I.L.R., 27 M., 45.

The amount of the widow's maintenance is to be settled, having regard to the *value of the estate*, to the *position and status* of the deceased *husband* and of the *widow*, as well as to the mode of life of the family during the husband's lifetime; and also having regard to what amount would be sufficient to allow the widow to live consistently with a widow's position, in the same degree of comfort and with the same reasonable luxury of life as in the husband's lifetime; and her proper maintenance should include "not only the ordinary *expenses of living*, but also that which she might reasonably expend for *religious and other duties* incident to the station in life which she might occupy": *Nittokissoree* v. *Jogendro*, 5 I.A., 55, 56-7; *Dalel* v. *Ambika*, I.L.R., 25 A., 266, 270; 11 B., 199, 206; 12 A., 558; 22 C., 410, 417; 9 W.N., 51.

The amount of maintenance to which a widow should be entitled as being proper under the above rule, cannot be curtailed by her husband by will: *Promotho* v. *Nagendra*, 12 W.N., 808.

Stepmother.—Although a widow's maintenance is a charge on the entire estate of her deceased husband, yet it has been held that *after* partition between her son and her stepsons, it will be a charge only on the share of her son, and not on that of her stepsons—an inequitable rule due to misapprehension of the Dáyabhága: *Hemangini* v. *Kedar*, I.L.R., 16 C., 758=16 I.A., 115. Our Courts have been misled by the *Ill-digested Digest* of Jagannátha who was a mere Sanskritist without law, and also without logic, though a *logician* he professed to be.

Daughters.—Unmarried daughters of the deceased proprietor are to be maintained by the heir until marriage. It has already been seen that the unmarried daughters of disqualified members are to be so maintained.

A married daughter is ordinarily to be maintained in her husband's family. But if they are unable to maintain her, she is entitled to be maintained in her father's family. It has,

however, been held by the Bombay High Court that an indigent widowed daughter, who fails to get maintenance from her father-in-law's family and is supported by her father, is not entitled after his death to claim her maintenance from his heirs: I.L.R., 23 B., 291. This view, however, is not approved by the Calcutta High Court which holds that she must, in the first instance, look for her maintenance to her husband's family; if she fails to show her inability to obtain maintenance from her husband's family, she cannot claim the same out of her deceased father's estate: *Mokhada* v. *Nundo*, I.L.R., 28 C., 278 = I.L.R., 27C., 555.

That a widowed daughter, who used to live and be maintained in her father's house, is not entitled to be so, and that her father's heir can turn her out into the public street in a destitute condition, seem to the orthodox Hindus monstrous propositions being most abhorrent to their feelings, and are due to the misapprehension of the usages and the meaning of the term "dependent member." In the Original side of the Calcutta High Court and in the Appeal Court, the question whether a sonless indigent widowed daughter, who used to live as a dependent member of her father's family, is entitled to maintenance from her father's estate in the hands of his heir, was discussed as if it was one of first impression in the recent case of *Mokhada Dassee*, I.L.R., 27 C., 555, and I.L.R., 28 C., 278. But the affirmative appears to have been accepted as settled law in the Appellate side. In 1796 Jagannatha (in Colebroke's Digest Book v. verse 399) put forward *kulinism* in Bengal as the reason in support of the proposition that a married or widowed daughter is entitled to maintenance from her father's estate. Sir William Macnaughten gives a case in which a widowed sonless daughter who was excluded from inheritance was held entitled to maintenance. Sir Thomas Strange also is of the same opinion. Babu Sylmacharan Sarkar, whose Vyavasthá-darpan used to be consulted as authority by the courts in Bengal until replaced by Mayne's work, is of the same opinion: (see p. 170 of the second edition). There are many unreported cases in which a widowed daughter, who used to be maintained as a dependent member of her father's family was held by our High Court to be entitled to get maintenance from her father's heirs. In one case, Justice Norris, after having referred to the Vyavasthá-darpan supporting the decision of the lower appellate court decreeing the daughter's claim, observed,—"Even if there be a shred to hang a peg on to support this

decision, we will do it." That was also the sentiment of the Vakils who appeared against the daughter, but had not the heart to argue their client's case, as their contention was unnatural and most repugnant to their own feelings.

Sometimes, the married daughter does not leave her father's house after her marriage but cotinues to live with her husband as *ghar-jámái* in her father's house: in such cases, she, her husband, and her children are entiled to maintenance from her father and his estate.

Sisters.—The maintenance of an unmarried sister and the expenses of her marriage are charges on the brother's estate, especially when it was inherited by him from an ancestor. It is most unfortunate that the sister is not recognised as heir.

Dependent members.—Poor relations and other dependent members whom a person used to maintain, as being morally bound to do so, are after his death entitled to maintenance from his heirs, provided he left sufficient property. Thus, it has been held that a person succeeding to his father's self-acquired property is bound to maintain his pre-deceased brother's widow who used to be maintained by her father-in-law: *Janki* v. *Nanda*, I.L.R., 11 A., 194; *Kamini* v. *Chandra*, I.L.R., 17 C., 373.

There has been some misconception about the meaning of the term *dependent member:* a person is called a *dependent member*, who depends on the family for his maintenance and actually gets his or her food and raiment from the family and lives in the family dwelling-house as a member of it. The *dependent members* are, no doubt, relations near or distant; but persons are not to be deemed *dependent members* by reason of their relationship only, irrespective of actual residence and support as members, inasmuch as these appear to be the *sine qua non* of one's character of being a *dependent member*. This appears to be the true meaning of the term दीना: समाश्रिता *(poor dependents)* in original Sanskrit: hence the view taken by the Original Court of the term *dependent member* appears to be in accordance with the meaning of the original Sanskrit term (5 W.N., 549, 558), and that of the Appeal Court seems to be contrary to the same: I.L.R., 29 C., 557 and 28 C., 278. If the actually existing state of things be not the criterion or test of the *dependent* condition, it is difficult to say what kind of relationship should be taken as the test to determine the same. The daughter-in-law and the daughter in these two cases respectively had been *dependent members* of their

father's family, in the sense of the original Sanskrit words, and therefore were not entitled to claim maintenance from their father-in-law's family of which they were not *dependent members;* in that character they could look to their father's heir for support. But their claim *as daughter-in-law* was different and not affected by this character.

But persons in this predicament are not entitled to separate maintenance except for very special causes; they are bound to reside in the house with the heir and to perform the reciprocal duty in connection with the household affairs as is ordinarily expected of him or her in Hindu Society; otherwise the burden would be very heavy on the heir, unless the inherited property be very large. It may be observed in this connection that female members of orthodox Hindu families have the duty of preparing the food for the family: so, one claiming the right cannot justly refuse to perform the corresponding duty of such a member; and the amount must be fixed on a reduced scale, should separate maintenance be awarded: *Bhagwan* v. *Bindoo,* 6 W.R., 286.

Under this head are included invalid adopted sons, concubines, (26 B., 163; 23 M., 282) illegitimate sons (I.L.R., 32 C., 479; 27 M., 13 & 32) and the like.

Right to maintenance not affected by lapse of time.—The Judicial Committee observes,—"By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow; and a Statute of Limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable": *Narayan* v. *Rama,* 6 I.A., 114, 118 = I.L.R., 3 B., 372. The fact that a widowed daughter-in-law had not received any maintenance, nor in any way asserted her right thereto, even for the long period over twenty-five years, does not affect her right prejudicially, when it ripens into a legal one and she is obliged to demand it, from her wants and exigencies, by reason of the inability of her paternal relations to maintain her through some change of fortune: 6 W.N., 530, 542.

Amount of maintenance.—As regards the amount of maintenance to which a widow is entitled out of her husband's estate, it has already been stated, (p. 387 *supra*); the question is now considered generally in respect of all cases. If a person be entitled to separate maintenance, then the question will arise as to its amount, the solution of which will depend upon the

extent of the property, the position of the family, the nature of the claimant's right, the number of other members of the family and other peculiar facts of each case: *Baisni* v. *Rup Sing*, I.L.R., 12 A., 558; 15 W.R., 73; *Nitya* v. *Jogendra*, 5 I.A., 55; *Devi Persad* v. *Gunwanti*, I.L.R., 22 C., 410, 417.

Where the right to maintenance is the legal incident of a right to property, such as that of the widow of the deceased proprietor, the lowest limit is to be determined by having regard to the extent of the property, and to similar right, if any, of any other person.

The widow of an undivided co-parcener has been held to be not entitled to claim from the survivor, more than the proceeds of the share which would have been allotted to the husband, had there been a partition during his life-time:' *Madhab* v. *Ganga*, I L.R., 2 B., 639; *Adhibai* v. *Cursan*, I.L.R., 11 B., 199—Mitákshará cases.

When, however, the property is very large, the maximum limit is to be ascertained by having regard to the expenses which the claimant will have to incur for living in the style suitable to the position of the claimant and of the family, that is to say, to the charges for establishment, food, clothing, religious ceremonies and the like, due to the claimant. The amount is not to bear any fixed ratio to the property: the sufficiency of the maintenance is the criterion: *Tagore* v. *Tagore*, 18 W.R., 373. But position depends partly on property.

It should be noticed in this connection that the share which is allotted to the father's wife on partition is held to be given in lieu of maintenance: the same therefore affords a guide in fixing the amount: I.L.R., 16 C., 758, 765; 27 C., 77, 80.

As regards the amount, a distinction should be drawn between those that are entitled to maintenance as the legal incident of their right to the property and those who have no such right. The amount decreed may be reduced or increased on a change of circumstances: I.L.R., 24 B., 386; I.L.R., 22 M., 175.

Other sources of maintenance.—If the claimant for maintenance is possessed of property yielding an income, that must be taken into consideration. It is doubtful whether a person possessed of sufficient means for support, derived from a different source, can claim maintenance from another person who would otherwise be liable to maintain him or her. Take, for instance, the case of a woman who has inherited her father's estate the income of which is more than sufficient for her maintenance. A widow was held to have no cause of action

for a suit against her brother-in-law when she had in her hands funds appertaining to the family estate, sufficient for five years' subsistence: *Dattatraya* v. *Rukma*, 33 B., 50. If the right to maintenance depends on necessity for the same, then surely a person whose maintenance is otherwise satisfied, is not in need of it, and therefore cannot lay a claim for what is *non est.* The right however seems to remain, but the amount must be *nil* or nominal, as that must be fixed having regard to the need which does not exist. But all this is open to the objection that the right to maintenance being a right to property, which the law confers on one person against another, and annexes it to some estate, why should any such extraneous consideration affect it in the manner set forth above, when the law does not say so?

How far a charge.—There seems to be a misconception on this subject owing to the disregard of the subordinate co-ownership or imperfect rights in property, which Hindu law recognizes, and of which the right to maintenance is one of the legal incidents. The maintenance of all persons having this imperfect co-ownership in the property must be a legal charge on the same; whilst, that of others, having no such right, may be deemed only an equitable charge on the property: *Ante* pp. 208-209.

But it should be specially noticed that the ancestral immoveable property is regarded by Hindu law as the hereditary source of maintenance of all the members of the family, dependent or independent: and no holder of it in whom it may be deemed vested, and who is described as "proprietary member" by Mr. Justice West, is competent to alienate it except for the snpport of the family. This is the view propounded even by Jímútaváhana, upon the authority of the text No. 1 cited above: see D.B., ii, 23-26.

The whole spirit of Hindu law is against alienation of ancestral immoveable estate which is the only source of maintenance of the helpless females, and also of the males in this country where agriculture is the chief source of wealth, and the Hindus depend solely on the produce of land for subsistence.

Thus, both law and equity are in favour of the proposition that maintenance is a legal charge on the estate, the holder of which cannot alienate it so as to defeat the right of maintenance; at any rate, of those that have an imperfect co ownership in the property, such as the wife of an owner of the property. Besides, it is erroneous to suppose the proprietary member to be absolute owner when there exists a female member who

acquired a right to it which also is proprietary though subordinate: I.L.R, 2 A., 315; 23 A., 86; 5 B., 99; 15 C., 305; 12 W.N., 808, 815.

Bona fide purchasers for value without notice—are great favourites of the English law recognizing legal and equitable estates, charges and liens.

Upon the analogy of English law our courts have held that *boná fide* purchasers for value without notice of the claim for maintenance, from the heir or other holder of the property, are not liable for the same. The learned judges proceed to discuss the question on the assumption that the widow has no lien on her husband's estate in the hands of his heir for her maintenance, and that it is only a claim against the heir personally: *Bhagabati* v. *Kanai*, 8 B.L.R., 225 = 17 W.R., 433; *Adhirani* v. *Shona*, I.L.R., 1 C., 365; *Lakshman* v. *Satyabhama*, I.L.R., 2 B., 494.

The wife's subordinate proprietary right to the husband's property is not at all noticed by the judges in these cases. It is unfortunate that that part of the Mitáksharà in which this right is recognised, was not translated by Colebrooke, and the consequence is that it is ignored both by lawyers and judges. The restrictions on the proprietary member's power of disposing of ancestral immoveable property, is also overlooked in this connection.

It has further been held that mere notice of the existence of her claim will not make the property in the hands of the purchaser liable, unless he had notice of the vendor's intention to defeat the claim for maintenance, or as Mr. Justice West puts it, a notice to be sufficient, must be "notice of the existence of a claim likely to be unjustly impaired by the proposed transaction": I.L.R., 2 B., 517; I.L.R., 22 A., 326; I.L.R., 24 A., 160; I.L.R., 23 B., 342.

But if a decree has been made in favour of the claimant charging certain property with maintenance, then and then only it will be a legal charge on the property, to whosoever person's hands it may go; a mere money-decree will not have that effect: I.L.R., 2 B., 524; 1 C., 365; 27 C., 195; *Muttia* v. *Virammal*, I.L.R., 10 M., 283; 20 W.R., 126; I.L.R., 4 A., 296.

A decree for maintenance obtained against a member representing a joint family can, after his death, be executed against joint property in the hands of the other members: *Subbanna* v. *Subbanna*, I.L.R., 30 M., 324.

It has also been held that even express notice at an execu-

tion sale will not affect the rights of the purchaser: *Soorja* v. *Nath*, I.L.R., 11 C., 102.

This view appears to be embodied in Section 39 of the Transfer of Property Act.

Hardship on females.—The result of the above view has been disastrous on Hindu females. Our Courts think themselves bound as courts of equity to protect the rights of those who are from their situation most helpless. The Hindu law assigns to females the status of perpetual dependence or tutelage; and having regard to their actual condition, they are regarded by both the Legislature and the Courts, to be incapacitated and incompetent to manage their estates and to protect their own interests. Accordingly it is held by our Courts that a document executed by a woman in this country, cannot be binding on her and affect her interests, unless it be proved not only that its meaning and legal effect were fully explained to, and understood by, her, but also that she had independent and disinterested advice about the same. They are really incapable of protecting their own interests, and are no better than children. In this state of things, they are completely at the mercy of their male relations for the protection of their rights: and if they have rights against those very relations, and if these feel no compunction to deprive the women of those rights, there is none to help them, except the Courts.

To what miserable state ladies of respectable families are often reduced, will appear from one typical instance of a class of cases that are unfortunately rather frequent. A man of property dies leaving young sons, and his widow, mother, and the like; the sons often become very soon surrounded by bad company containing some money-lenders, and are led astray to squander property in a vicious course of life; debts have soon to be contracted, but there is no difficulty, the money-lender companion is ready to advance money on promissory notes at first, and then on mortgages; all other properties are gradually sold, sometimes in execution; and last of all comes the turn of the family dwelling-house, when, however, a difficulty presents itself in consequence of the ruling in the case of *Mangala Devi* v. *Dinanath Bose*, according to which the females residing in the house cannot be turned out by the purchaser into the public street. But the money-lender is equal to the occasion; he advances some money to the now utterly depraved sons, to send away the women on pilgrimage, who are not aware of the actual state of things, and

would gladly accept the proposal; and when they leave the house, the purchaser is put in possession of the same. On their return, the women find that their home is gone and that they have nothing to live upon. This is not an imaginary case, but an actual one that has recently happened.

These money-lenders are often mistaken for *bonâ fide* purchasers for value.

The Purdanashin ladies are completely in the dark as to what is being done by the "proprietary members" of the family, with respect to its property so long as they go on receiving their ordinary maintenance, until when the whole property has become dissipated, and it is too late for them, according to the above decisions, to get any remedy.

If the right view be adopted and acted upon, the helpless women would be saved, while *bonâ fide* purchasers would have their conveyances executed by the proprietary members as well as by these women whose rights would then be secured to some extent at least.

If, however, the property has been sold for the support of the family or for the benefit of the estate, or for like necessity, the purchaser must be safe. But if the sale is made for the proprietary member's personal purposes, the purchaser cannot claim to have more than that member's personal interest in the property.

To hold that the Hindu females must secure their right of maintenance by decrees declaring the same to be a charge on certain property, is practically the same thing as to deprive them of the right.

Besides, it is difficult to understand how a court of justice can pass a decree converting a personal right against the defendant, into a charge on his property. A court of justice can only declare the pre-existing rights of suitors, but cannot confer any rights on them, except by importing the peculiar artificial distinctions between law and equity, which are not necessarily founded on broad principles of justice universally applicable.

Transfer, and arrears of maintenance.—A right to maintenance being from its very nature a right restricted in its enjoyment to the claimant personally, cannot be transferred, nor seized and sold in execution of decree. See Transfer of Property Act, Section 6 clause (*d*), Civil Procedure Code Section 266, and *Diwali* v. *Apaji*, I.L.R., 10 B., 342.

But although the right to future maintenance is not liable

to sale, yet arrears of maintenance may be sold: *Hoymabati* v. *Karuna*, 8 W.R., 41; *Raje* v. *Nana*, I.L.R., 11 B., 528.

It is not necessary that a demand for maintenance should be made by the person having the right to it, in order to be entitled to claim arrears: *Jivi* v. *Ramji*, I.L.R., 3 B., 207.

But in assessing the amount of arrears the Court may take into consideration as to how the claimant was actually maintained. Suppose, a widow was maintained by her own father who is also morally bound to maintain his daughter, and no demand was made from the husband's relations, in such a case it is doubtful whether she can claim any arrears under such circumstances.

Decree and future maintenance.—When a decree awards future maintenance at a fixed rate, payable monthly or annually during the life of the claimant, the same when falling due can be recovered in execution of that decree without further suit: *Asu* v. *Lakhi*, I.L.R., 19 C., 139; 30 M., 324. But a mere declaratory decree for maintenance cannot be so enforced: I.L.R., 12 M., 183.

A widow in Possession of her husband's estate—appears to be bound to maintain her husband's poor relations, in addition to those already mentioned, and especially the presumptive reversioner, when he is in need of it: D.B., 11, 1, 63. Here, gifts to husband's relations are declared to be conducive to the spiritual benefit of the husband: Text No. 11, *ante* p. 379.

Impartible estate and junior members.—When the family property is held by a single member by primogeniture prevailing in certain cases according to custom, the junior members are entitled to a provision for maintenance out of the property. Usually some property is assigned to them in lieu of maintenance, the nature and character of the tenure of which are also determined by custom. Usually the *khorposh* grants in Chhota-Nagpore where many impartible estates are found, are like *estates tail-male*, held by the grantees and the heirs male of their body in succession to each other, and on failure of such heirs at any future time they revert to the holders of the estate for the time being; in some cases these maintenance grants are resumable on the death of the grantees; it depends entirely on custom in each case: see Section 124 of Act 1 of 1879, Bengal Council; see also *infra* Chapter XV, on Impartible Estates.

CHAPTER XII.

FEMALE HEIRS AND STRIDHANAM.

ORIGINAL TEXTS.

१ । भार्य्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।
यत् ते समधिगच्छन्ति यस्यैते तस्य तद्-धनं ॥ मनुः ॥

1. A wife, a son, and a slave, these three even are ordained destitute of property: whatever they acquire becomes his property, whose they are.—Manu—viii, 416.

२ । पिता रक्षति कौमारे भर्त्ता रक्षति यौवने ।
पुत्रो रक्षति वार्द्धक्ये न स्त्री स्वातन्त्र्यम् अर्हति ॥ मनुः ॥

2. The father protects in maidenhood, the husband protects in youth, the son protects in old age,—a woman is not entitled to independence.—Manu—ix, 3.

३ । रक्षेत् कन्यां पिता, विन्नां पतिः, पुत्रश्च वार्द्धके ।
अभावे ज्ञातयस्तेषां, न स्वातन्त्र्यं स्त्रियाः क्वचित् ॥ याज्ञवल्क्यः ।

3. A woman is not entitled to independence in any period of her life; her father shall protect her when she is maiden, her husband when she is married, her son when she is old; and in their default their kinsmen shall protect her.—Yájnavalkya—i, 85.

४ । अध्यग्न्यध्यावाहनिकं दत्तञ्च प्रीतितः स्त्रियैः ।
भ्रातृ-मातृ-पितृ-प्राप्तं षड्-विधं स्त्रीधनं स्मृतं ॥ मनुकात्यायनौ ॥

4. What was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the wife through affection, and what has been received by her from her brother, her mother, or her father, are ordained the sixfold *strídhanam* or woman's property.—Manu and Kátyáyana, D.B. iv,, 1, 4.

५ । अध्यग्न्यध्यावाहनिकं भर्तृदायस्तथैव च ।
भ्रातृदत्तं पितृभ्याञ्च षड्विधं स्त्रीधनं स्मृतं ॥ नारदः ॥

5. What is given before the nuptial fire, what is presented in the bridal procession, likewise her husband's donation *(dáya)*, and what is given by her brother or by her parents, are ordained the sixfold *strídhanam*.—Nárada.

६ । पितृ-मातृ-सुत-भ्रातृ-दत्तम् अध्यग्न्युपागतं ।
आधिवेदनिकं बन्धुदत्तं शुल्कान्वाधेयकम् इति स्त्रीधनं ॥ विष्णुः ॥

6. What is given by her father, or mother, or a son, or a brother, what is received before the nuptial fire, what is presented to her on her husband's marriage to another wife, what is given by a relation, the *sulka* or bride's price, and gift subsequent,—these are *strídhanam.*—Vishnu.

७ । पितृ-मातृ-पति-भ्रातृ-दत्तम् अध्यग्न्युपागतं ।
आधिवेदनिकाद्यञ्च स्त्रीधनं परिकीर्त्तितं ॥ याज्ञवल्क्यः ॥

7. What is given by her father, mother, husband, or brother, or what is received before the nuptial fire, or what is presented to her on her husband's marriage to another wife, or the like *(ádya)*, is denominated *strídhanam* or woman's property.—Yájnavalkya.

८ । वृत्तिराभरणं शुल्कं लाभश्च स्त्रीधनं भवेत् ।
भोक्त्री तत् स्वयमेवेदं पतिर्नार्हत्यनापदि ॥ देवलः ॥

8. Her subsistence, ornaments, bride's price, and her gains (or profits of her *strídhana*) are *strídhana*, she herself exclusively enjoys it, her husband has no right to use it except in distress.—Devala.

९ । विवाहकाले यत् किञ्चित् वरायोद्दिश्य दीयते ।
कन्यायास्तद्-धनं सर्व्वम् अविभाज्यञ्च बन्धुभिः ॥ व्यासः ॥

9. Whatever is (formally) given at the time of the marriage to the bridegroom (intending to benefit the bride), belongs entirely to the bride, and is not to be shared by kinsmen.—Vyása, cited in D. B, iv, 1, 16.

१० । यद्-दत्तं दुहितुः पत्ये स्त्रियम् एव तद्-अन्वियात् ।
मृते जीवति वा पत्यौ तदपत्यम् ऋते स्त्रिया ॥

10. What is presented to the husband of a daughter, goes to the woman, whether her husband live or die, and after her death, goes to her offspring.—Text cited in D. B., iv, 1, 17.

११ । प्राप्तं शिल्पैस्तु यद्-वित्तं प्रीत्या चैव यद्-अन्यतः ।
भर्त्तुः स्वाम्यं भवेत् तत्र शेषन्तु स्त्रीधनं स्मृतं ॥ कात्यायनः ॥

11. The wealth which is earned by mechanical arts, or which is received through affection from any other (than a relation), becomes the subject of the husband's ownership: but the rest is ordained *strídhana.*—Kátyáyana cited in D. B, iv, 1, 19.

१२। यत् पुनर्लभते नारी नीयमाना हि पैतृकात्।
अध्यावाहनिकं नाम तत् स्त्रीधनम् उदाहृतं॥ कात्यायनः॥

12, Whatever again, a woman receives at the time she is taken from her father's house (to her father-in-law's house), is denominated her *strídhana* under the name *adhyávâhanika* or presented in the bridal procession—Kátyáyana, D. B., iv, 1, 5.

१३। विवाहात् परतो यत् तु लब्धं भर्त्तृकुलात् स्त्रिया।
अन्वाधेयं तद् उक्तन्तु लब्धं बन्धुकुलात् तथा।
ऊर्द्ध्वं लब्धन्तु यत् किञ्चित् संस्कारात् प्रीतितः स्त्रिया।
भर्त्तुः पित्रोः सकाशाद्-वा अन्वाधेयन्तु तद्-भृगुः॥ कात्यायनः॥

13. But whatever is, after marriage, received by a woman from her husband's family is called gift subsequent, and likewise what is received from the family of her relations: whatever is received by a woman through affection after marriage, from her husband or her parents is gift subsequent according to Bhrigu.—Kátyáyana, D.B., iv, 3, 16 and 18.

१४। ऊढ़या कन्यया वापि पत्युः पितृगृहेऽथवा।
भर्त्तुः सकाशात् पित्रोर्वा लब्धं सौदायिकं स्मृतं॥ १॥
सौदायिकं धनं प्राप्य स्त्रीणां स्वातन्त्र्यमिष्यते।
यस्मात् तदानृशंस्यार्थं तैर्दत्तं तत्प्रजीवनं॥ २॥
सौदायिके सदा स्त्रीणां स्वातन्त्र्यं परिकीर्त्तितं।
विक्रये चैव दाने च यथेष्टं स्थावरेष्वपि॥ ३॥ कात्यायनः॥

14. (1) That which is received by a married woman or a maiden in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred. (2) The independence of women who have received such gifts, is recognized in regard to that property: for, it is given by them for the women's maintenance out of kindness to them. (3) The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale according to their pleasure, even in the case of immoveables.—Kátyáyana,—D. B., iv, 1, 21.

१५। भर्त्रा प्रीतेन यद्-दत्तं स्त्रियै तस्मिन् मृतेऽपि तत्।
सा यथाकामम् अश्नीयाद्-दद्याद् वा स्थावराद्-ऋते॥ नारदः॥

15. What is given to the wife by the husband through affection, she may, even when he is dead, consume as she pleases, or may give it away, excepting immoveable property.—Nárada.

१६। (a) भर्तृदायं मृते पत्यौ विन्यसेत् स्त्री यथेष्टतः।
विद्यमाने तु संरक्षेत् क्षपयेत् तत्कुलेऽन्यथा॥
(b) अपुत्रा शयनं भर्त्तुः पालयन्ती गुरौ स्थिता।
भुञ्जीतामरणात् क्षान्ता दायादा ऊर्द्ध्वम् आप्नुयुः॥ कात्यायनः॥

16. (a) The husband's *(dáya)* gift (or heritage), a woman may deal with according to her pleasure when the husband is dead; but when he is alive, she shall carefully preserve it, or if she is unable to do the same, she shall commit it to the care of his kindred.

(b) A sonless (widow) keeping unsullied the bed of her lord and abiding by her venerable protector, shall, being moderate, enjoy until death, afterwards the heirs shall take.--Kátyáyana.

[This second sloka which is cited in the Dáyabhága Ch. XI, Sect. 1, paragraph 56, as the only authority for restricting the widow's rights in her husband's estate inherited by her, relates really to Strídhana consisting of immoveable property given by the husband. And the sloka immediately preceding it, is cited in D.B, Ch. iv, Sect. 1, para. 8]

१७। न भर्त्ता नैव च सुतो न पिता भ्रातरो न च।
आदाने वा विसर्गे वा स्त्रीधने प्रभविष्णवः॥
यदि ह्येकतरस्तेषां स्त्रीधनं भक्षयेत् बलात्।
स वृद्धिं प्रतिदाप्यः स्यात् दण्डश्चैव समाप्नुयात्॥ कात्यायनः॥

17. Neither the husband, nor the son, nor the father, nor the brothers, can assume power over a woman's property, to take it or to bestow it. If any of these persons by force consume the woman's property, he shall be compelled to make it good with interest, and shall also incur punishment.—Kátyáyana, D.B., iv, I, 24.

१८। जीवन्तीनान्तु तासां ये तद्धरेयुः स्वबान्धवा।
तान् शिष्यात् चौरदण्डेन धार्म्मिकः पृथिवी-पतिः॥ मनुः॥

18. Those relations of women, who take their Strídhana during their life without their consent, shall be punished by a virtuous king by inflicting the punishment of a thief.—Manu cited in the Viváda-Ratnákara.

१९। दुर्भिक्षे धर्म्म-कार्य्ये च व्याधौ सम्प्रतिरोधके।
गृहीतं स्त्रीधनं भर्त्ता न स्त्रियै दातुम् अर्हति॥ याज्ञवल्क्यः॥

19. A husband (may take and) is not liable to make good the property of his wife (so) taken by him, in a famine, or for the performance of an imperative religious duty, or during illness, or under restraint—Yájnavalkya.—ii, 147.

२० । (अर्हति स्त्री) न दायं,—निरिन्द्रिया ह्यदायादाः स्त्रियोऽनृतम्—इति श्रुतेः ॥ बौधायनः ॥

20. A woman is not entitled to inherit; for, a text of revelation says,—"Devoid of prowess and incompetent to inherit, women are useless."—Baudháyana cited in D.B., Ch., XI, Sect. VI, para. 11.

FEMALE HEIRS AND STRIDHANA.

Women in ancient law.—Lifelong subjection was the condition of women according to ancient law. This appears to have been due to the physical weakness and the impulsive nature of the fair sex, as well as to two peculiar institutions common to most systems of archaic jurisprudence, namely, *patria potestas* and slavery, the latter of which appears to have owed its origin to the former.

Patria potestas—is the father's absolute and unlimited power over his children, in the exercise of which he could sell, give, abandon or even kill a child of his. The reason assigned by Vasistha (*ante*, p. 118) to explain this power is, that the father and the mother are the cause of a child's existence, and so they are entitled to full authority over his person, extending even to the undoing of it. This natural reason, though equally applicable to the mother, is qualified by her own personal disability.

Slavery consisted in the proprietary right of man over man; one man might own and have dominion over another man, in the same manner as he can own a cow or a dog. A slave is contemptuously termed a *biped* in Sanskrit, to indicate his similarity to a quadruped.

Marriage in ancient law consisted in the transfer of dominion or *patria potestas* from the father to the husband, (*ante*, p. 85), so that in Roman law a wife was deemed to be a *daughter* of the husband for the purpose of the *patria potestas*.

Hence it is clear that during the life of the *pater familias* the condition of a son, a daughter, a wife, and a slave was exactly similar, as regarded the power of the former over the latter, who could not hold any property, being themselves in the category of property belonging to the *pater familias* who therefore, became entitled to their earnings (Text No. 1). On his death, however, a change took place in the condition of the son, who became emancipated and *sui juris*, and succeeded to the deceased's position as regards

his property. But the condition of the women at first, and of the slaves, seems to have remained unchanged, there being only a change of masters.

But the women appear to have very soon acquired a higher status than that of the slaves, so far as regarded their relation to the husband's heir, who became their guardian by ceasing to be their master.

As incidents of their status, women could not, according to early law, hold any property, and consequently they could not become heirs to their relations (Text No. 20).

Women's property and heritable right under the Codes.—To the general rule of women's incapacity to hold property, exceptions appear to have been gradually introduced, similar to the son's *peculium* in Roman law, according to which a son in the power of his father could not acquire property for himself, all his acquisitions, like those of a slave, belonged to his father.

At first six descriptions of property were recognised as woman's property; and these consisted of gifts received by a woman from four relations, namely, the father, the mother, the brother, and the husband, as well as of gifts received at the time of marriage when the ceremony was actually being performed before the nuptial fire, and of gifts received when the bride was taken to her father-in-law's house (Text Nos. 4 and 5).

To this list, other items *ejusdem generis* appear to have been added, as will appear from a perusal of the above texts; gifts from all other relations, and certain other descriptions of property are included as falling within the category of woman's peculiar property. Upon a consideration of all the items described as *strídhana*, it appears that woman's property under the Codes consisted only of gifts or grants made by her relations; and some of them are separately enumerated either to remove some doubt, or to mark the occasions of the gift.

It would be better to enumerate and explain different items of *strídhana* mentioned in the Codes :—

I. Gifts at the time of marriage or *yautaka*; they are—

(1) Gifts before the nuptial fire, or at the actual ceremony of marriage.

(2) Gifts received in her father's or father-in-law's house, either before or after the actual ceremony, but at a time when various other rites appurtenant to marriage are performed, commencing from several days before, and continuing several days after, the principal nuptial ceremony.

Adhyává̱hanika or gifts in the bridal procession come under it; but this term may also be explained to mean gifts made at the time of the *Dvirágamana* ceremony, or of the *gamana* called *gowna* ceremoney in Behar and N. P. Provinces.

(3) *Sulka* or the bride's price.

(4) To these must now be added the bridegroom's price.

Gifts at the time of marriage are the most important, because all women get some property at that time. It should be observed that what is given before the nuptial fire by the bride's father intending to benefit her, is formally given to the bridegroom. It should be borne in mind that the bride herself is the subject of gift to the bridegroom; and the dress, the ornaments and the household furniture, &c., which are intended for her, are all given together with her to the bridegroom. In fact, the principal ceremony of marriage consists of the ceremonial gift of the bride made by the father or other guardian to the bridegroom and the ceremonial acceptance of her by the bridegroom. Hence Vyása ordains (Text No. 10) that all these belong to the bride; and besides, these are separately enumerated as *strídhana* under the name of "gift before the nuptial fire".

Sulka or the bride's price was originally appropriated by the bride's father; but Vishnu (Text No. 9) and Devala (Text No. 9) enumerate it as *Strídhana,* and therefore the father or other guardian taking it, must hold it as trustee for the bride.

The bridegroom's price also, which according to recent practice originating in the moral and religious degradation of the so-called educated men, is extorted by the bridegroom's party from the bride's father, must on the similar and stronger grounds of equity, be considered to be the bride's *Strídhana,* and the recipient must be held to be a trustee for her.

II. *Adhyává̱hanika* consists of what is given to the bride when she is *conveyed* from her father's to her father-in-law's house. In Bengal proper, there are two occasions for such gifts: the first occasion is just after the nuptial ceremony, when the bride is taken to her father-in-law's house to stay there only for a few days which are included under the time of marriage, so that gifts then made may be called *yautuka*; the second occasion is called *Dwirágamana* or *second coming,* of the bride to her father-in-law's house, after attaining puberty,

for the purpose of living there permanently as a member of his family and performing the duties of a wife to her husband, when she receives some gifts from her father. In Behar and N. W. Provinces, however, there is an usage according to which the bride is not taken to her father-in-law's house just after marriage, but she goes there for the first time after attaining puberty, for the purpose of permanently residing with her husband: this is called *gawna* or *going* ceremony, when some property is usually given to her by her parents and other relations also, and this is called *gift in the bridal procession*: *Churamon* v. *Gopi*, 10 L.J., 545.

III. *A'dhivedanika* or the gift which a husband is to make to a wife on the occasion of marrying another wife.

IV. *Anvádheyaka* or "gift subsequent" is a term used in contra-distinction to *yautuka* or gift at the time of marriage; it means and includes a gift made, or property received, subsequently to the marriage. In the Bengal school, the courses of descent of these two descriptions of *Stridhana* are different.

V. *Vritti* or subsistence or property given for, or allotted in lieu of, maintenance, is *Strídhan*, such as the mother's share on partition; but it is not so held by our courts, *ante p.* 316.

VI. Ornaments form the kind of *Stridhana*, which is possessed by every woman. These are *Strídhana* when they have been the subject of gift to her. There may be family jewels, which any woman of the family is allowed to put on on particular occasions, but which may not be given to any one of them; these cannot be regarded as *Strídhana*. Many Hindus are found to convert all their savings into gold ornaments worn by themselves or by their wives; these also cannot be regarded as the wife's *Strídhana;* for, these cannot be presumed to be subjects of absolute gift by the husband to the wife; if that were so, a man might be deprived of the savings of his whole life by the death of his wife before him.

VII. Acquisitions made by a woman by the practice of a mechanical art, are subject to the control of the husband who appears to be entitled to the fruits of the wife's bodily labour.

VIII. So also a present made to a woman by a stranger, *i.e.*, by one who is not a relation, belongs to her husband and cannot become her *Strídhan*. Hindu law is jealous of women's connection with strangers; the present is really made to please the husband by a friend or a subordinate of his, consisting, however, of a thing that may be used by a woman

only, such as an ornament or a female dress, and so intended for the wife.

IX. Gifts by affectionate kindred or near relations constituted, as has already been said, the peculiar property of women, under the Codes, though there are some vague terms used in a few texts, which may be construed to include other descriptions of property.

X. The husband's gifts require special notice. From the peculiar character of the relationship, a gift by the husband to the wife should not be taken as absolute, so as to extinguish completely the husband's right to the thing given. As regards even the moveable property given by the husband she cannot deal with it according to her pleasure during his life-time, but may do so after his death—(Text No. 16-*a*); and when the subject of gift is immoveable property, she has no right to dispose of it even after the husband's death.—Texts Nos. 15 and 16 (*b*).

The original general rule that women are incompetent to inherit, was departed from by the Codes, to a limited extent; and the lawfully wedded wife, the daughter, the mother and the paternal grandmother, are declared entitled to inherit the property of males; and certain females are declared heirs to *Strídhana* property.

According to the Codes, the property inherited by women became their *Strídhana;* because the very fact of one's becoming heir to another's estate, means, that the former acquires all the rights of the deceased over his property, and because there is no express text restricting women's heritable right.

There is, however, one rule relating to *Strídhana* property which may be extended by analogy to the husband's immoveable estate inherited by the wife, namely the rule, which restricts the wife's right over the husband's *gift* of immoveable property to her, may be deemed to restrict by necessary implication her heritable right over his immoveable estate.

But there is nothing in the Codes to curtail the rights of the other female heirs over property inherited by them either from males or from females. The curtailment of women's rights in property inherited by them from *males* became necessary in the Bengal school for reasons which cannot at all apply to the Mitákshará school. The Bengal school conferred heritable right on women by abolishing survivorship which exclude women from inheritance in joint families governed by the Mitákshará. And thus the Bengal women's position with

curtailed heritable right is superior to that of the Mitákshará females whose rights in inherited property were not curtailed in any way by that treatise which, however, has not been followed by our Courts, and in consequence the Mitákshará women's heritable right has been curtailed in a way most unjust to them, which is explained later on.

Woman's property and heritable rights under Commentaries.—A great deal of injustice has been done to women by not keeping in view the great distinction between the early law contained in the Codes, and its later development by Commentators, with respect to their disabilities and rights. There cannot be any doubt that women were originally disqualified for owning and holding property, and that under the Codes that disability continued as a general rule, but certain exceptions to it were introduced, and women were declared competent to hold as owner only certain specified descriptions of property, the peculiar character of which was expressed by the technical term *Strídhana* or woman's property. On a consideration of the enumeration of *Strídhana* given by the different Codes, a development of law in favour of women is found; for, while the earlier Codes lay a stress on the number six in enumerating *Strídhana*, the later ones either add fresh items, or describe woman's property in a mode indicating the enumeration to be only illustrative, and not exhaustive; and the impression left on the mind of the reader on a perusal of the passages of the Code is, that *Strídhana* or woman's property had but a technical and limited meaning.

But when we come to the Commentaries, we find higher rights conferred by them on women who are placed almost on a par with men, as regards the capacity to hold property. *Strídhana* or woman's property ceases to have any technical meaning, and it is explained to mean property "belonging to a woman"; accordingly women may acquire property in the same modes as men may do, subject to one or two exceptions. The general rule and the exceptions are now reversed; for, under the Commentaries, as a general rule, all kinds of property may be *Strídhana*, while the exceptions relate to a few items that do not come under that category. Let us examine what is said by the leading Commentaries on the present subject.

The Mitakshara—which is, as we have already seen, a work of paramount authority, and universally respected, says while commenting on the Text No. 7 of Yájnavalkya,—that the term *Strídhana* as used in that text, bears no technical

meaning, but it signifies "woman's property" or property belonging to a woman, which is its etymological meaning, (2, 11, 8); that the term "or the like" in that text, includes property that a woman may acquire "by inheritance, purchase, partition, seizure or finding," *i.e.*, by the same modes in which a man may acquire property and which are set forth in Ch. 1, Sect. I, paras. 8 and 13; and that Manu and other sages also intended to lay down the same rule, the enumeration by them of six-fold *Strídhanam* being illustrative and not intended to be restrictive:—Mit. 2, 11, 2 and 4.

Here the Commentator changes the law by the fiction of interpretation. He ignores the existence of any disability or incapacity in women with respect to the ownership of property, such as may appear from a perusal of the texts of the Codes. But we have nothing whatever to do with what Manu and Yájnavalkya really intended to ordain; what we have to see is, what construction has been put on them by the commentators respected by the different schools: (See *ante*, pp. 27 and 30). The Mitákshará is clear and unambiguous that *Strídhana* has no technical meaning, and women may hold property like men, and that property inherited by a woman is her *Strídhanam;* and according to the Privy Council (*ante*, p. 34), the European Judges are bound to follow and act upon it without stopping to enquire whether this doctrine is fairly deducible from the earliest authorities. But on the present question, their Lordships have themselves acted contrary to their own direction and advice to the lower Courts, as we shall presently see.

Katyayana's text and Mithila School.—The Viváda-Ratnákara and Vivāda-Chintámani are the principal commentaries of the Mithila sub-division of the Mitákshará school. They do not enter into any discussion as to the term *Strídhana* being technical or limited in its meaning; but they seem to accept the view propounded by the Mitákshará, while they go on citing and explaining the diverse texts of the Codes on the subject of *Strídhana.*

The Vivāda-Ratnákara while dealing with *Strídhana* cites the text of Nárada (Text No. 15), recognizing the full power of a wife over the husband's gifts excepting immoveable property; it then cites the three slokas of Kátyáyana, set forth above as Text No. 14, and after making a few comments on them concludes by saying that it is established on the authority of all the texts cited, that women are independent

in dealing with property inclusive of immoveables given by the affectionate relations, excepting, however, immoveable property given by the husband; it then cites the two slokas of Kátyáyana's Text (No. 16), which have a very important bearing on women's right in property given by, or inherited from, their husbands. According to the explanation given in the two commentaries of the Mithila School, the English translation of the 1st sloka (Text No. 16) is slightly different from what is given above, should be as follows :—

(*a*) "The husband's *dáya* gift (or heritage), a woman may deal with according to her pleasure when the husband is dead; but when he is alive, she shall carefully preserve it; otherwise (*i.e.*, when he has no property) she should remain with his family." The second sloka may also be given here for the sake of convenience in understanding the explanation.

(*b*) "A sonless (widow) keeping unsullied the bed of her lord, and abiding by her venerable protector, shall, being moderate, enjoy until death; afterwards the heirs shall take."

Both the commentators of the Mithila School admit, that having regard to the context, both these texts relate to the husband's *gifts* to the wife, and that they lay down that a woman is perfectly independent after the husband's death in dealing with moveables *given* by the husband, and as regards immoveable property *given* by the husband, she shall enjoy it during her life, and afterwards the husband's heirs shall take the same.

But they maintain that these two slokas must apply also to the moveables and immoveables *inherited* by a widow from her husband, because the term *dáya* in these texts may mean either heritage or gift, and these two meanings are equally capable of being construed with the other words of the text, and there is no text opposed to such a construction; and that hence, although the context shows that these slokas relate to gifts, yet by reason of the two-fold meaning of the term *dáya* they furnish us with a rule that may be applied to the husband's heritage as well.

The result is, that according to the Mithila School, the wife's right to the moveable and immoveble properties *inherited* from the husband is similar to her right to similar properties *given* by the husband; that is to say, the wife's right to moveables *inherited* from the husband is absolute, *i.e.*, they become her *Strídhan* in the technical sense; but her right to immoveables is limited, and she must have in all cases what

is technically called a life-interest in such property which will after her death pass to her husband's heirs.

The Vivâda-Chintâmani, however, goes further and says that these texts apply also to the husband's immoveable property which the wife *inherits* not deirctly from the husband but mediately *through her son* who had inherited it, and then died leaving his mother as his heir,—in the following passage, —

एवञ्च मृतस्य पत्युः स्थावरे भार्य्यासंक्रान्तेऽपि न तस्या दानादौ स्वातन्त्र्यं आकाङ्क्षा-तौल्यात् । अन्यथा तत्र कीदृशी व्यवस्था स्यात् इत्याकाङ्क्षा अपूर्णैव तिष्ठेत् । अतएवास्य वचनस्य सौदायिक प्रकरणाम्नान-विरोधोऽपि अपास्तः प्रकरणापेक्षया आकाङ्क्षायाः बलवत्तात् । यथा पतिदत्ते स्थावरे वचनात् दानादौ स्त्रीणाम् अनधिकारः तथा पत्युः स्थावरेऽपि स्त्रीसंक्रान्ते । एवमेव प्रकाश-रत्नाकरौ । एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि (पत्युः) स्थावरे । अत्रापि आकाङ्क्षा-सत्त्वात् साक्षाद्-वचनस्य चाश्रुतेः ।

The following is a literal translation of this passage :—

"And thus also in the deceased husband's immoveable property devolved by inheritance on the wife, her independence does not exist in making gift and the like, by reason of the Equality of Expectancy. Otherwise, the Expectancy as to what is the rule about it, would remain unsatisfied. Hence also the inconsistency of the recital of this text in the chapter on Saudâyika (*Strídhan*) or '*Gifts from the affectionate kindred*' with its application (to property *inherited* from the husband) is removed. Because Expectancy is of greater force than the Context. Just as in immoveable property *given* by the husband, there is incompetency of women in making gift and the like by reason of this text, so also in the husband's immoveable property *devolved by inheritance* on the wife. The (authors of the) Prakâsa and the (Vivâda)-Ratnâkara are of the same opinion. Thus also in the (husband's) immoveable property *devolved by inheritance* on the wife *through the son.* Herein also, the Expectancy exists, and there is not found any express text on the subject."

In some manuscript copies of the original Sanskrit Vivâda-Chintâmani there is the word पत्युः before the word स्थावरे thus,—एवं पुत्र-द्वारा स्त्रीसंक्रान्तेऽपि पत्युः स्थावरे = "Thus also in the *husband's* immoveable property devolved on the wife by inheritance *through*

the son." The meaning, however, is the same, whether there be that word or not; since the other words suggest the word by necessary implication, even if that word be omitted.

The term Expectancy आकाङ्क्षा is a technical word meaning one of the three conditions required to be fulfilled by a collection of words for constituting a Sentence. In the Sáhitya-Darpana a well-known treatise on Sanskrit Rhetoric, a Sentence is thus defined :—

वाक्यं स्याद्-योग्यताकाङ्क्षाऽऽसत्तियुक्तः पदोच्चयः ।

which means,—"A Sentence is a collection of words possessing Compatibility, Expectancy, and Proximity;" and the following is the literal translation of the explanation of this definition given by the author himself,—

"*Compatibility* means absence of unreasonableness in the mutual relation of the meanings of the words: if a collection of words could be a Sentence without this (Compatibility), then even the words—'He irrigates with fire'—would be a Sentence.

"*Expectancy* (= interdependence of words) means absence of completion of sense (without construing one word with others); and this (absence of complete sense) consists in the listener's (or reader's) desire (on hearing or reading a word) to know (something conveyed by the other words of the collection, if the same is a Sentence). If a collection of words without Expectancy could have been a Sentence, then a collection of words, such as—'A cow, a horse, a man, an elephant' would have become a Sentence.

"*Proximity* is absence of interruption in the knowledge (of the words). If there could be a Sentence even when there is interruption in knowledge, then there would be a coalescence (into one Sentence) of the word 'Devadatta' pronounced just now, with the word 'goes' pronounced the day after.

"Since Expectancy and Compatibility are properties, the one of the mind of the reader, and the other of things (signified by the words), it is by a figure of speech, that they are here represented as properties of words."

We are now in a position to understand the meaning of the technical term "Expectancy" and "Equality of Expectancy." The word *dáya* in the above text suggests to the mind of the reader or listener of that text, both its meanings, namely "gift" and "heritage," and his Expectancy or desire to know the connection of the other words of the text with

the word *dáya*, is Equal as regards both its meanings, being equally compatible with either.

The fact that these two slokas are found in that part of Kátyáyana's Code, where *saudáyika stridhan* is dealt with, does not prevent their application to the husband's heritage; for, according to a well-known rule of interpretation the *Expectancy* or the force of words prevails over the context, or in other words, the context cannot control or restrict the meaning conveyed by the words of the slokas, in the absence of any text expressing a contrary meaning: see Jaimini's Mímánsá on the Topic called वाक्यस्य प्रकरणाद्यपेक्षया प्राबल्याधिकरणं or the superiority of a Sentence over the context &c. : 3, 3, 9.

The Viváda-Chintámani maintains that on the same principle, these texts apply also to immoveable property which had been husband's heritage, though the same comes to the wife by inheritance from her son on whom it had devolved directly from the husband.

Hence by reason of the application of these slokas to the husband's immoveable property inherited by a woman from her son, the two rules therein laid down must apply, namely (1) her power of alienation is restricted, and (2) her husband's heirs inherit the same after her death.

This peculiar doctrine arising from the construction of these slokas of Kátyáyana, by the author of the Viváda-Chintámani which is respected as a work of paramount authority in Mithila, was brought to the notice of the Sudder Dewany Court of the North-West provinces in the fifties, by the pundit who was the Hindu law officer of that court, and judgment was delivered by that court according to the Pundit's opinion, in which a person's sister's son was held heir on the death of his mother, to the estate which had devolved on that person from his father, and which on his death went to his mother, as his heiress; the person's sister's son as *his heir* could not be preferred to his agnates, but as *heir of his father* could be so preferred, according to the said construction of that text of Kátyáyana: *Thakoorain Saheba* v. *Mohun Lall*, 11 M. I. A., 386.

When this case was heard on appeal by the Privy Council, the English translation by P. C. Tagore, of the Viváda-Chintámani had been published; but as the above passage was mistranslated, the Pundit's opinion seemed to be contrary to it, and it was not explained to their Lordships how the Pundit arrived at that conclusion, it was therefore rejected by the

Judicial Committee, who held that the sister's son was not an heir at all,—a proposition which cannot now be held correct.

My attention was drawn to this passage of the Vivâda-Chintâmani in 1893, by the client in the case of *Mohun Persad v. Kishen Kishore*, I.L.R., 21 C., 344, who had consulted a Benares Pundit and brought an original Sanskrit copy of that work, but it was not necessary to refer to it in that case, in which the *Stridhana* property only was in dispute.

It should be observed that according to the Mithila school, a woman's right is restricted only in the husband's immoveable property inherited by her whether from him, or from his and her son. But as regards moveable property and the son's self-acquired property inherited by her, the same must become her *stridhana.* Subject to the above exception, a woman's right in inherited property must be absolute, in the same way as the right of a male heir.

Accordingly in the first edition of his translation of the Vivâda-Chintâmani, the rule XIII of the Table of Succession given by Babu P. C. Tagore was as follows :—" If the mother die after inheriting her son's property, such property becomes her *Stridhan.* Hence the heirs of her peculiar property get it." But this was contrary to his mistranslation of the above passage "एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि (पत्युः) स्थावरे" into—" if the *mother*, on the death of her son, get *his* immoveable property, she cannot make a gift of it or dispose of it ;"—the correct translation being,—" Thus also in the (husband's) immoveable property *devolved by inheritance* on the *wife through the son.*"

Owing to the said inconsistency, the Calcutta High Court rejected the said rule xiii and held that immoveable property inherited by a mother from her son goes on her death to the son's heirs and not to her heirs : *Punchanund v. Lalshan*, 3 W.R., 140. This view is supported by the said mistranslation. And it is curious that Babu P. C. Tagore in the second Edition of his translation changed the rule XIII so as to make it quite contrary to what it was in the first Edition. Had he been a genuine Sanskrit scholar, he would have acknowledged the mistranslation and corrected it and also maintained the accuracy of the said original rule xiii.

But, according to the correct doctrine of the Mithila school, if the immoveable property was the son's self-acquired property, the same was to descend to the mother's heirs, and if the same was inherited from the father, then it was to descend to the father's heirs; but in no case could it descend to the son's

heirs. But unfortunately the Viváda-Ratnákara was not then translated, and the error in the rendering of the above passage was not pointed out to the court.

It should specially be noticed that the effect of the correct doctrine is to bring in two near and dear relations, namely, the son's sister and her son who are the original proprietor's daughter and daughter's son, in preference to the comparatively more distant agnates. And this is but the ordinary course of development of law according to natural justice, in every system of Jurisprudence.

Katyayana's text and the Dayabhaga.—It should be borne in mind that according to the Mitákshará school the widow is entitled to inherit only in the exceptional circumstance of the husband being separate, *i.e.*, when he was neither joint nor re-united with any co-heir. The widow's succession therefore must be rare, having regard to the fact that the joint family system is the normal condition of Hindu society, and it takes place when there is no other dear and near relation who may be the object of the deceased proprietor's affection along with his wife. Hence there is no reason why the widow who has been the partner of the deceased during his life, and who is believed to become his partner in the next world, should not be absolutely entitled to his estate, when the most distant male heir, whose very existence might not be known to him, would take an unlimited and absolute interest.

The author of the Dáyabhága introduced a complete change in the law by recognizing the heritable right of the widow in default of male issue, in all cases, *i.e.*, even when the husband was joint or re-united with his co-parceners, that is to say, in preference to, and to the exclusion of, his father, mother, brother, and the like near and dear relations with whom he was associated from birth, and lived in harmony during his whole life.

Such a radical change in the law of succession could not be acceptable to the people unless the widow's rights were curtailed and limited in the manner adopted by the Dáyabhága.

The acute founder of the Bengal school conferred higher rights on females in one respect, by curtailing their rights in other respects, and thus he improved the condition of women, on the principle of give-and-take, in such a manner as to secure the approbation of the people of Bengal, for the change in law, which was suited to their feelings, and so became adopted by them.

Let us now see how the author of the Dáyabhága shows that his foregone conclusion is supported by the earliest authorities.

He cites the five slokas of Kátyáyana in different parts of his work: the three slokas (No. 14) are cited in paragraph 21, and the sloka *a* (No. 16) in paragraph 8 of Section i of Chapter iv, in which *Strídhana* is explained; but the sloka *b* (No. 16) is cited in paragraph 56, Section i, Chapter xi, where the widow's succession is discussed, for supporting his position with respect to the restrictions on the widow's power of alienation.

He maintains that the widow inheriting her husband's estate is entitled only to enjoy it with moderation, but not to alienate the same by gift, sale or mortgage, &c., and in support of this position he cites Kátyáyana's text (sloka *b*, No. 16) as if it related to property inherited by a woman from her husband, without any allusion to its meaning according to the context, and without feeling any hesitation or difficulty in relying on a text the primary meaning of which is not what he puts upon it.

We are in a position now to appreciate the great importance of the remark made by the Privy Council, namely, that the Courts of Justice must not trouble themselves with the question whether a doctrine maintained by a school is fairly deducible from the earliest authorities.

The language of this text of Kátyáyana applies to the widow only. But the change of the law of inheritance, introduced by the author of the Dáyabhága, was also in favour of the daughter and the daughter's son, as well as of the mother and the paternal grandmother. And it was felt by the author to be necessary to curtail their rights also.

So he at first extends the operation of his interpretation of Kátyáyana's text to the daughter (xi, i, 65) and then to the daughter and to the daughter's son, upon the ground that they being inferior to the widow with respect to inheritance, the restrictions imposed by that text on the widow's estate should *a fortiori* apply to them also :—Chapter xi, Section ii, paragraph 30.

And lastly he puts it artfully as an alternative, that the text must be understood as applicable to female heirs only, the term widow being merely illustrative; and he thereby implies that it does not apply to the daughter's son: xi, i, 31. And this alternative is now accepted as the doctrine of the Bengal school. For, of two alternative interpretations put by the author in two passages one following the other, the latter is taken to prevail as being intended to be the preferable one.

Here we have an extension of meaning based on the gender of the words; hence the meaning must be that the *female* heirs of a *male*, take a limited interest, having regard to the context of the Chapter which deals with succession to the property of a *male*: that is to say, it can by no means apply to a female heir of a *female's Strídhana*.

Woman's estate in property inherited from males under Dayabhaga,—

1. She has merely the right of enjoyment with moderatin: Ch. 11, 1, 56 and 61. So she has not even a life-interest.

2. If the estate falls short of what is sufficient for her legal enjoyment, she may alienate a part or even the whole of it, if necessary: Ch. 11, 1, 62.

3. Save as aforesaid, her rights in both moveable and immoveable property is limited, and she cannot alienate them; Ch. 11, 1, 56.

4. Her management of the estate is subject to the control of her husband's kinsmen who are her legal guardians; in other words, subject to the control of the reversioners: Ch. 11, 1, 64.

5. She may dispose of the property with the consent of the reversioners: Ch. 11, 1, 64.

6. She is enjoined to maintain, and to make gifts to, poor relations of the husband's: Ch. 11, 1, 63.

7. The reversioners are entitled to the residue of the estate and of its accretions, left after her lawful enjoyment: Ch. 11, 1, 69.

Stridhan according to Dayabhaga.—The Dáyabhága appears to follow the Mitákshará, and to hold that *Strídhana* or woman's property has no technical meaning. After citing many texts describing different kinds of woman's property, the author observes that the texts do not intend to exhaustively enumerate woman's property, but they intend to explain by illustrations the nature of woman's property; and then concludes by saying, "That alone is a woman's property, which she has power to give, sell, or use independently of her husband's control: Ch. iv, i, 18.

And he then goes on to show that the husband's control is confined to the wife's earnings by the practice of mechanical arts and to presents made by strangers. To these two must be added the gifts by the husband, especially immoveable property: Ch. iv, i, 19-23.

It follows, therefore, by necessary implication that the author adopts the view propounded in the Mitákshará, of the

nature of *Strídhana*, namely, that it has no technical meaning: her capacity to hold property is not restricted; save and except the said three kinds of property, with respect to which she is subject to the husband's control, all other properties vesting in a woman in the modes in which a man would become owner, are her *Strídhana*.

Viramitrodaya and Smriti-chandrika on Katyayana's text.—The Viramitrodaya repeats the view propounded by the Mitákshará, with respect to *Strídhana*.

This work is regarded by the Privy Council to be a treatise of high authority at Benares and to be properly receiveable as an exposition of what may have been left doubtful by the Mitákshará, and to be declaratory of the law of the Benares school :—*Giridhari Lal Roy* v. *Bengal Government*, 12 M.I.A., 448 = 10 W.R., 31.

The author of this work notices the text of Kátyáyana (sloka *b*, No. 16), and maintains that it refers to the property assigned to the widow of a deceased undivided co-parcener, for maintaining herself from its profits :—Vir, p. 136.

He then notices the construction put on it in the Dáyabhága and disapproves of the same. He maintains that the widow as heir must necessarily be absolute master of the inherited property, and text like this must be taken to be of moral obligation only, such as those with respect to which the doctrine of *factum valet* is propounded by the author of the Dáyabhága. And he concludes by saying that the utmost that can be said is, that gift and the like alienation made by a widow for immoral purposes or without any necessity, may be held improper: otherwise, she has full power to dispose of property for religious and other lawful purposes :—Vir., pp. 137-141.

The Smriti-Chandriká notices the text of Kátyáyana, and explains it to refer to the widow of a member of a joint undivided family, who has received from her husband's surviving co-parceners an assignment of landed property for getting her maintenance from the income thereof. In fact, the Víramitrodaya has borrowed the explanation of Kátyáyana's text from this work which is frequently cited and referred to by it and other commentaries under the name of "Chandriká."

Judicial Committee on Katyayana's text.—It should be observed that heritage means property in which the heir acquires *ownership* by reason of relationship to the late owner; therefore when a woman becomes the heir, she must acquire

an absolute right to the inherited property, in the sense that all the rights in the property constituting the deceased proprietor's estate or heritage must pass as well to a *female* as to a male *heir* as such, unless there be an inherent disability on her part, or there be an express text curtailing her rights.

There would have been an inherent disability, if *Strídhana* had still been held to have a technical meaning, or if the original incapacity of women to hold property had been admitted even now to continue; or in other words, if women could not have absolute right in any kind of property, which is not *expressly* enumerated as *Strídhana*. But the paramount authorities of both the schools hold that women do not, as a general rule labour under any such disability or incapacity, whatever might have been their condition in early law.

Therefore their rights in inherited property cannot be curtailed, unless there be an express provision of law to that effect. And Kátyáyana's text (No. 16) is the only passage of Smriti or law by which women's rights in *heritage* are curtailed according to the Dáyabhága and to the commentaries of the Míthila School. It should be observed that the term *dáya* (heritage) is used in this text; hence the commentators curtailing the widow's or female heir's rights in inherited property rely on this text, and not on a few others prohibiting alienation by a widow, in which the term *ansa* (share) is used, which may be, and has been, explained away to refer to a portion of the husband's property, assigned to a widow for maintenance from its usufruct.

Kátyáyana's complete Code is not extant. It is, however, admitted by the writers of the Mithila School, that this text of Katyáyana relates actully to the immoveable property *given* by the husband.

So there is really no authority in Hindu Law, against the doctrine maintained by the Mitákshará, that property inherited by a woman becomes her *Strídhana*.

But the Privy Council held this doctrine to be erroneous by reason of its being in conflict with the text of Kátyáyana who is recognised by the Mitákshará as a lawgiver, (*supra*, p. 4), though the text is not cited in the Mitákshará : *Bhagwandeen* v. *Myna Bai*, 11 M.I.A., 487 = 9 W.R., P.C., 23. The Lords of the Judicial Committee were betrayed into this position by assuming the interpretation put on it by the Dáyabhága to be its only real meaning. And herein their Lordships departed from their own view of the duty of an European judge in dealing with Hindu law :—*supra*, p. 34. By rejecting the

interpretation put by the Mitákshará on Yájnavalkya's text on Strídhana, their Lordships did what their Lordships held in the unchastity case, the court is not justified in doing : *supra*, p. 325.

What really happened was that the Dáyabhága rule had been erroneously applied to some cases governed by the Benares school, in which the property in dispute was small; and when at last the question arose in a big case going up to the Privy Council, the view already acted on in the previous cases and seeming to be sanctioned by usage, was maintained intact, as the materials necessary for arriving at the correct view of the law were not placed before their Lordships.

And their Lordships have proceeded further: not only the rule extracted by the author of the Dáyabhága from his peculiar interpretation of Kátyáyana's text, but also his extension of that rule to cases not covered by the language of that text, have been applied by the Privy Council to cases governed by the Benares school. Accordingly the daughter has been held to take the widow's estate in her father's property (*Chotay Lal* v. *Chunnoo Lal*, I.L.R., 4 C., 744); and the same rule has been applied by the Calcutta High Court to the mother's inheritance: *Julleswar* v. *Uggar*, I.L.R., 9 C., 725.

Thus the females governed by the Benares school have been subjected to the restrictions and limitations of the Bengal school, while the privilege enjoyed by the Bengal females, of inheriting from their male relations even when these were joint or re-united, could not be granted to them. They have thus been deprived of their substantial rights without any compensation whatever.

It should be remarked here, that the text of Kátyáyana lays down two continuing conditions for the enjoyment by the widow, of her husband's estate, namely, (1) chastity and (2) residence with the husband's relations. It has, however, been held that these are not to be taken as conditions subsequent; inasmuch as the author of the Dáyabhága has not himself drawn any such conclusion from that text, and as the courts themselves would not be justified in drawing any such conclusions from the Smriti texts cited in the commentaries. Hence it has been held in *Cossinath Bysack's* case that the widow inheriting her husband's estate is not bound to live with her husband's kinsmen; and in the Unchastity case, that subsequent unchastity will not divest.

Privy Council on Stridhana.—In the case of *Brij Indar Bahadur Sing* v. *Ranee Janki Koer*, 5 I.A., 1, the Judicial

Committee, took into their consideration all the passages of the Mitákshará and the Dáyabhága, in which the character of *Strídhana* is discussed, and came to the only conclusion that may properly be deduced from them, namely, that *Strídhana* has no technical or restricted meaning; and their Lordships laid special stress on the conclusion arrived at by Jímútaváhana, namely, "That alone is *(Strídhana)* her peculiar property, which she has power to give, sell, or use, independently of her husband's control." The words "her peculiar property" in this passage are misleading, the correct rendering should be, "That alone is *woman's property*, which &c.;" so there is no peculiarity about woman's property. Their Lordships also relied on the explanation of *Strídhana* given in the Mitákshará, Ch. 2, Sect. 11, para 2 and para. 3, in which it is laid down that property which she may have acquired by inheritance, purchase, partition, seizure, or finding are denominated "woman's property;" and that the term *Strídhana* or 'woman's property' conforms in its import with its etymology, and is not technical.

The facts of this case were as follows:—A *Taluk* in Oudh, in possession of a Hindu widow to whom it had descended as the heir of her husband, was confiscated by the Government, and was subsequently granted to her by a *Sunnud*, with right of alienation, and with right of succession to her heirs.

The *Taluk* was held by the Privy Council to have become the *Strídhana* of the widow, by the grant to her, and to pass on her death, to her heirs and not to her husband's heirs. The grant was made by a stranger, to a Hindu lady, and therefore if made during her husband's lifetime, it is doubtful whether it could become her *Strídhana*. But as it was made to a widow, there was nothing to prevent it from being her *Strídhana*. If *Strídhana* had been technical and restricted in its meaning, and if nothing could have been *Strídhana* unless expressly ordained to be so, then it could not have been held that the *Taluk* had become the grantee's *Strídhana*. See *Bachha Jha* v. *Jugmohan Jha*, I.L.R., 12 C., 348.

The principle enunciated in this case represents the true view of Hindu law, though it is in conflict with the opinion expressed by the Privy Council in some earlier cases (*Mt. Thakur Deyhee* v. *Rai Baluk Ram*, 11 M.I.A., 139 = 10 W.R., P.C., 3), and is overlooked in some later cases.

According to this principle it has been held in the case of *Sham Koer* v. *Dah Koer*, 29 I.A., 132, that when a widow of

a member of Mitáksharà joint family, who would not be entitled to anything more than maintenance out of his estate, obtained possession of three villages appertaining to his estate, not as the result of an arrangement with the husband's heirs, her possession was adverse to them, and their rights were barred at the expiration of twelve years from the date of the husband's death. So she acquired title by adverse possession, and the property became her *Strídhanam*, and devolved as such after her death on her heirs.

Case-law on Stridhana and property inherited from male.—It should be noticed that,—

(1) According to the Bengal school a woman inheriting the estate of a male, has a limited interest or what is called the *widow's estate* in both moveable and immoveable property:

(2) That this Bengal doctrine has been (though improperly) extended to cases governed by the Benares school: and

(3) That according to the Mithila school the widow inheriting her husband's estate, either directly from him, or mediately through her son, takes an absolute estate in the moveables, and a life-interest in the immoveables in all cases; for her interest in such property is the same as in property given by the husband.

She is therefore competent in Mithila, to alienate the moveables according to her pleasure: *Doorga* v. *Pooran*, 5 W.R., 141; *Biajan* v. *Luchmi*, I.L.R., 10. C., 392; 11 M.I.A., 487.

The moveable property becomes her *Stridhan*, and must therefore pass to her heirs on her death.

The widow is likewise absolutely entitled to the proceeds of the immoveables: for, her interest therein is the same as in immoveable property given by the husband.

Hence the savings of the income of the inherited immoveable property, as well as any immoveable property purchased therewith, must be her *Strídhana*, and pass on her death to her heirs, and not to her husband's heirs. This great distinction between the Bengal school and the Mithila school should be kept in view.

The question of succession to the moveables and the savings, &c., under the Mithila law, is an open one, and has not yet been decided: 2 M.I.A., 181 (251).

It should be observed that the daughter takes an absolute estate in property inherited from her father, according to the Mithila school; and so also the mother as regards the son's self-acquired property. But owing to the mistranslation of the

exposition of Kátyáyana's text, as given in the Viváda-Chintámani, the Mithila law has been misunderstood, and the Bengal doctrine applied to Mithila cases: 3 W.R., 140.

In Bombay the Mithila rule seems to be followed to some extent, subject, however, to an extension in consequence of all the *sapinda* females being recognised as heirs.

There the widow, the mother and the like relations, becoming members of the family by marriage, are held to take a limited interest.

While the daughter, the sister, the brother's daughter and the like, who are born in the family, are held to take the estate absolutely.

In Bombay the widow and the like appear to have an absolute power of disposal over the moveables; but yet it has been held that the moveables must pass, on the widow's death, to her husband's heirs: I.L.R., 16 B., 229 and 233.

In Madras also it has recently been held that the widow's power over the moveables is not larger than over immoveables, I.L.R., 8 M., 290 and 304.

The perusal of most of the Mitákshará cases will show that the Bengal doctrine has been permitted to make considerable inroad on the Mitákshará school; the attention of the judges was not attracted by the great distinction between the two schools as regards the inheritance of women. And the learned judges appear to labour under the misconception that *Strídhana* is even now technical and limited in meaning.

Stridhana inherited by woman.—The Bengal High Court has gone further and held that even *Strídhana* inherited by female heirs, does not become the latter's *Strídhana*: I.L.R., 5 C., 222; 17 C., 911. And this view has been adopted by the Madras High Court: I.L.R., 19 M., 107 and 110.

The only authority on which this view is based, is the opinion expressed by Srîkrishna in his Dáyakrama-Sangraha, namely, that inherited property does not become *Strídhana*. There is no authority in support of this broad position, and there is no reason why the writer should be raised to the position of a law-giver. The writer was neither a judge nor a lawyer but a mere Sanskritist without law, who appears to have lived in the begining of the seventeenth century. He is not regarded by the people of Bengal as any authority. He has, however, been thurst into prominence by the adventitious circumstance of his work being translated into English at an early time.

Ask any Bengali as to the law by which he is governed, and the answer you will invariably receive is, that he is governed by the Dáyabhága; no body will name either Srikrishna or Dáyakrama-Sangraha.

Now, not only there is nothing in the Dáyabhága in support of the above view: on the contrary, a persual of the chapter IV of the Dáyabhága wherein *Strídhana* and its devolution are discussed, will convince the reader that the daughters take the same interest in their mother's *Strídhan* as sons.

Because, it is a peculiar doctrine of the founder of the Bengal school, that sons and daughters *equally* inherit their mother's non-*jautaka Strídhan;* and in arguing out this position, he refers to the well-known maxim that "Equality is the rule where no distinction is expressed:"—D.B., iv, 1, 8. It is difficult to understand, how in the face of what the founder maintains, namely, that the heritable right of the son and the daughter is equal, can it be contended that they take different estates. This would be over-ruling Jímútaváhana by Srikrishna.

Besides in nine hundred and ninety-nine cases out of every thousand, *Strídhan* consists of moveables only; and the heir male or female takes it absolutely according to the popular belief and usage. That the female heir takes only a limited interest, and is not absolutely entitled, is an idea which is not known to the people, nor even to the persons likely to become reversioners. If that were the law, how is it that there is no provision made by Hindu law for the protection of the future interest of reversioners?

In the case of property inherited from males there is such a provision; for, the widow is directed to reside with the persons likely to be reversioners, and to manage the estate subject to their control: D.B., 11, 1, 56-64.

It should be noticed in this connection, that there is no commentator of the Mitákshará school maintaining the view propounded by Srikrishna. Hence that doctrine cannot properly be extended to cases governed by the Mitákshará. Accordingly the Allahabad and the Bombay High Courts have recently held that a woman's *Strídhan* inherited by a female becomes the latter's *Strídhan: Devi* v. *Sheo*, I.L.R., 22 A., 353 and *Gandhi* v. *Bai*, I.L.R., 24 B., 192.

It is a matter of very great regret that the Privy Council have reversed the above decision of the Allahabad High Court, the learned Judges of which thought themselves free to follow the law laid down in the Mitákshará and the Víramitrodaya

respected as paramount authority in the Benares school: *Sheo Sankar* v. *Debi Sahai*, 30 I.A., 202; 30 I.A., 209. The learned Judges of the Allahabad High Court were aware that the Mitákshará doctrine of inherited property being *Strídhan*, was held inapplicable to property inherited by a woman from a male relation; but they were also aware that that view was the result of there having been many decisions of the Bengal Courts in which the Bengal law had been applied to Mitákshará cases, without however any notice of the law laid down in the Mitákshará itself, to which the attention of the Courts was not drawn at all by "lawyers without Sanskrit" who appear to have been familiar with the Bengal law but completely ignorant of the different doctrine of the Benares school on the subject. Their Lordships were, therefore, of opinion that the said fact could not justify the total rejection of that doctrine of the Mitákshará law, which therefore was held by them to be applicable to the property inherited by women from females, there being no decided case of the Benares school to the contrary. But the Judicial Committee say that as the language of the Mitákshará does not allow any distinction to be drawn between the heritage of males and that of females, with respect to the rights of female heirs; and as the doctrine has not been followed in the Mitákshará cases of inheritance from males, and in Bengal and Madras also in the cases of inheritance from females; and as Macnaghten in his Hindu Law, Vol. I, p. 38, applies the rule that what has once passed by inheritance as *Strídhan* does not so pass a second time, to the Mitákshará law as well as to that of Bengal; therefore their Lordships are unable to agree with the High Court of Allahabad. In their Lordships' opinion Macnaghten's work is of higher authority as valuable evidence of the law as it was actually understood, than the Mitákshará itself. But their Lordships forget that the Hindus of Benares school who are governed by the Mitákshará law, believe their law to be of divine origin, and feel the highest respect for the Mitákshará as being a commentary on their divine law, composed by the highly venerated ascetic Vijnána Bhikshu or Yogin, and that they cannot have any respect for a view of their law contrary to what is expressly stated in that treatise. Whatever the text-writers and judges may say and hold, it cannot but be admitted that in this respect the law of the Courts has been thus made different from the law of the people in all places: it has already been observed that, as a general rule, *strídhan* consists of

moveables only, and the actual usage with respect to them is that female heirs take the same absolutely; and the law could not be otherwise, there having been no means for preserving future interests in such property, which would be absolutely necessary if the law were such as is now enunciated by the Highest Court to be. It is unfortunate that the attention of a Judge of Sir Arthur Wilson's pre-eminence and Indian experience was not directed to the question whether the maxim of *Stare decisis* is properly applicable to all cases of Hindu law, having regard to the facts that the Hindus are a conservative and religious people tenaciously adhering to their customary law believed by them to have emanated from the Deity; that the Judges having no access to the original treatises, and being ignorant of the actual usages, cannot be held to be repositories of Hindu law in the same manner as the English Judges in England are of English law; and that the decisions being not reported in the languages of the people, they cannot be presumed to be accepted by the Hindus as the basis of their transactions, specially when they are inaccurate expositions of their law: nor to the question whether on these grounds the view taken by the Allahabad High Court should not be upheld as the proper one by reason of its conformity to the original commentaries on Hindu law.

Mother's share.—It has already been shown that the mother is entitled to a share on partition. And it has been held that a purchaser from a son takes, subject to the mother's right, and stands in his vendor's shoes; at a partition by him the mother is entitled to a share: *Amrita* v. *Manick*, 4 W.N., 764. It has also been held that she has an inchoate or *quasi*-contingent right to a share, on a suit for partition being instituted by a son, and a purchaser after the suit is affected by *lis pendens: Jogendra* v. *Fulkumari*, I.L.R., 27 C., 77.

The share to which the mother in both the schools, and the stepmother under the Mitákshará, are entitled to get on a partition of the property by the sons, is intended to become their *Strídhanam* or absolute property. That it is *Strídhana* according to the Mitákshará is beyond all doubt. Because the Mitákshará says that on the mother's death, this share devolves on her daughters, and in default of the daughters, on her sons.

Besides there are two strong reasons for considering this share to be the recipient's *Strídhana:* (1) if the mother has got *Strídhana* from the husband or the father-in-law, then so much only is to be allotted to her, as together with what has been so

received, would be equal to the share of a son; hence when a share is so constituted, her right to its different component parts ought to be the same; (2) when on a partition shares are allotted to different persons, the right of each to his or her share must *prima facie* be of the same character, in the absence of any express distinction; hence the right of the mother to her share must be of the same character as that of a son to his share, since no distinction is anywhere expressed. These arguments apply to the Bengal school as well.

But as a great deal of misconception prevails about the character of *strídhana*, it has been held that this does not become *strídhana* according to the Bengal school (*ante*, p. 316); and there is an *obiter dictum* to the same effect, with respect to cases governed by the Mitáksharà school (*ante*, p. 269.) But the correct view has recently been adopted by the Allahabad High Court: I.L.R., 24 A., 67 and 82.

It is taken for granted that this share is given for the purpose of maintenance only; if that were the object, why should a share be given at all, when the property is very large; and how again can the share be sufficient for maintenance, when the property is very small? Hence the assumption is groundless and unsupported by authority or reason.

Contemplate the condition of a Hindu mother when her sons separate from each other during her life, and there is a general disruption of the family. How is she to live, if all the sons separate from her? Is the Pardanashin lady to live alone under the zenana system in solitary confinement? That might have been her lot, but for the share allotted to her by the Hindu law, and intended by it to be her absolute property. If not for her sake, at least for the sake of her property, some one of her sons or some other relation of hers, would consent to live with her. And this is the real reason why a share is assigned to her, instead of maintenance only. It is also intended to act as a deterrent on sons, for dissuading them from violating the religious injunction which requires brothers to live together so long as the parents are alive.

Thus we see that the Hindu females have been deprived of many rights, by reason of the materials in their favour not being properly placed before the Courts. The Pardanashin ladies could not personally look after their own causes, and thus they were in a disadvantageous position in the unequal contests with their male adversaries, and so there is no wonder that they have been improperly cast even in British Indian Courts, the

Judges whereof cannot but be naturally disposed to protect their rights, but appear to have been misled by the analogy of the disabilities of women in England.

Let us now proceed to discuss the widow's estate and its incidents.

Widow's estate.

Anomalous.—The nature of the widow's estate under the Dáyabhága has already been mentioned (*supra* p. 415). But the Courts of Justice felt considerable difficulty in giving full effect to all its incidents; and so the law on the subject has been altered to some extent in favour of the widow.

(1) The widow is required to enjoy with moderation: she is enjoined to lead a life of austerity, and is forbidden to wear delicate apparel or to eat rich food. Compliance with this requirement was considered difficult to enforce, and so this restriction has been dispensed with, and it has been held that the widow may, if she chooses, spend the whole income arising out of her husband's estate, and she is not bound to save a single farthing.

(2) But if she does not spend the whole income, but saves and accumulates any portion, and invests these in the purchase of immoveable property, and dies without making a valid disposition, the same shall pass to her husband's heirs who are entitled to everything that has not actually been enjoyed or consumed by her.

(3) Although the widow has not even a life-interest when the property is large, still as a corollary of the position that she is not bound to be moderate as regards the expenditure of the income, it has been held that even without any necessity the widow may sell her husband's estate so as to pass to the vendee an interest in it for her life.

(4) The restriction imposed on the widow that in her management of the estate, she shall be subject to the control and guidance of her husband's kinsmen, has been set aside, perhaps on the ground of its being a moral injunction only, the estate being completely vested in her, and no part of it being vested in the husband's next heir during her life. But it has been overlooked that this was intended for the protection of their future interest.

(5) But yet a partial effect has been given to the said restriction by holding that the widow can, with the consent of the husband's next male heir for the time being, transfer

without any legal necessity, any property appertaining to her husband's estate, so as as to give an absolute title to the transferee even against the actual reversioner who may be a different person.

(6) When the property is small, and not sufficient for her lawful expenses, she may sell the whole of it, so that the widow's interest varies from an absolute estate when it is small, to less than a life-interest when it is very large, although she is permitted, if she chooses, to convert it into a life-interest in the latter case.

(7) Although the widow's estate in both *moveable* and immoveable property, is a limited one, yet the only mode of preserving the future interest of the husband's heirs, provided by Hindu law, namely, the control of the husband's kinsmen over her management of the estate, is not ordinarily given effect to.

(8) The result is that the widow is, subject to the restrictions relating to alienation, entitled to exercise the most absolute power of enjoyment over the estate which is entirely vested in her, and she represents the estate fully as if the husband is alive in her, and no one else can have any vested interest in the succession so long as she is alive: she is not accountable to any one, and she cannot be deemed to hold the estate in trust for reversioners in any sense, and can deal with the property in such manner as is most beneficial to herself, irrespective of the question whether the same is prejudicial to the interests of the reversioners: *Singam* v. *Draupadi*, I.L.R., 31 M., 153.

Thus the Hindu widow's estate has become an anomalous and peculiar one. It is thus described by the Privy Council in the Unchastity case, I.L.R., 5 C., 776 :—

"According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship—as to which see the *Shivaganga* case—does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the temination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The succession does not open to the heirs of the

husband until the termination of the widow's estate. Upon the termination of the estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death."

This anomalous *widow's estate* is what is taken by the female heirs in the estate of males according to the Bengal School. But that is not the view of the Mitákshará School, although the Bengal doctrine has improperly been extended to cases governed by the Benares School, and also by the Southern Schools to some extent.

It may be noticed in this connection, that according to the Mitákshará, the heirs to the *strídhana* of a woman married in the approved forms, and dying without leaving any heir of her body, are the same persons who are her husband's heirs and they take in the same order. So the succession of the husband's heirs to his estate inherited by his widow after her death might have contributed to the false idea that such property is not her *strídhan*, although they succeed as *her* and not as the *husband's* heirs.

As regards the Mithila School, its peculiar doctrines have not been overlooked; and accordingly the widow's estate there, is such as has already been pointed out (p. 407) and differs materially from what is technically called the *widow's estate*.

Property received by widow by settlement or compromise.—In the case of *Brij Indar Bahadur* already noticed, it was held by the Judicial Committee that a Hindu widow acquired an absolute title to a Taluk in Oudh, which had been confiscated and was afterwards settled with her by Government under the Oudh Estates Act, although the widow had been in possession of the Taluk as her husband's heir at the time of confiscation. The view taken by their Lordships appears to have been based on the express provisions of that Act. Accordingly, when a widow of an under-proprietor called *Mukaddam* inherited the undertenure, and the Government while making a settlement with the *Mukaddams* excluding the superior proprietors by giving them an allowance by way of *Malikana*, settled the undertenure with the widow in possession,—it has been held that the widow became entitled only to a widow's estate in the enlarged estate, inasmuch as the action of the Government in making the settlement with her cannot be held to have the effect of constituting her a zemindar having a title independent of that inherited from her husband: *Kashi* v. *Inda*, I.L.R., 30 A., 490.

When a widow inheriting her husband's estate enters into a compromise with her husband's co-parceners, according to the terms of which some property is assigned to her, in lieu of her husband's undivided share, then a question arises whether she acquires an absolute title to the same or only a Hindu widow's estate therein, the solution of which depends upon the intention of the parties to be gathered from the words of the document, looked at with reference to the parties who use them, and the quantity of the property assigned. The property given to her may represent either her life-interest received in her personal character, or the husband's estate received in her representative character for enjoyment as a Hindu widow for life only. In the former case the property would become the widow's *strídhana*, the other party to the compromise being her husband's separated co-parceners and reversioners; while in the latter, she would have only the widow's limited estate: *Sambasiva* v. *Venkata*, I.L.R., 31 M., 179--*on appeal*--30 M., 356; *Sm. Rabuttee* v. *Sib*, 6 M.I.A., 1; *Munshi Karim* v. *Kunwar Govinda*, 13 W.N., 1117 = 31 A., 497.

But a family arrangement to which a widow was a consenting party whereby the disputes between the members of the family were settled, and whereby the widow obtained one-fourth of the joint property instead of one-third which was her husband's share therein --is held to be not binding on the reversionery heir who was not a party to the arrangement: *Asharam* v. *Chandi*, 13 W.N., 147.

Lapse or forfeiture of widow's estate.—It should be observed that the widow inherits her husband's estate, in the character of being the surviving half of the husband; all wives are not entitled to inherit (D.B. 11, 1, 48), those only who are *patnis*, *i.e.*, who are lawfully wedded wives, and with whom the connection is religious and permanent so as to subsist even in the next world, are recognised as heirs. When therefore the widow gives up this chatacter and connection by re-marriage, her right to the deceased husband's estate ceases: *Matumgini* v. *Ram*, I.L.R., 19 C., 289; Act XV of 1856, Section 2. There cannot be any difference between a re-marriage under this Act and a re-marriage under custom or one otherwise contracted, as regards its legal incident of divesting the widow of her deceased husband's estate: *Murugayi Viramakali*, I.L.R., 1 M., 226; *Rasul* v. *Ram*, I.L.R., 22 C., 589. But it has been held by the Allahabad High Court that a widow belonging to the sweeper caste among whom the custom of re-marriage of widows prevails,

and to whom therefore the Hindu Widow's Re-marriage Act does not apply, does not forfeit by re-marriage her right to her deceased husband's estate inherited by her, nor her right to maintenance under a decree against her husband in his life-time, declaring the same to be a charge on his property in possession of his vendees and donees: I.L.R., 11 A., 330; *Gajadhar* v. *Kausilla*, 31 A., 161. This view appears to be founded on the assumption that Section 2 of that Act laid down a new rule; whereas it did only embody the rule of Hindu law according to which the widow has the right to enjoy her husband's estate or to receive maintenance, in her capacity of being the surviving half of her deceased husband, which right must necessarily be extinguished by the determination of that capacity on re-marriage. But mere unchastity of a widow who has not renounced that capacity by re-marriage, has not the effect of putting an end to the connection with her deceased husband.

When a widow adopts a son in the exercise of a power of adoption which may be deemed constructive pregnancy for the purpose of accounting for some of the legal consequences of adoption; then also her interest in her husband's estate ceases, and so does the interest of a transferee from her without legal necessity: *ante* p. 176; *Rama* v. *Tripura*, I.L.R., 33 B., 88.

Two or more widows or other female heirs.—There seems to be some misconception about the nature of the estate taken by two or more female heirs in the property jointly inherited by them.

According to the Bengal School, two or more persons succeeding together take as tenants-in-common, and not as joint-tenants in any case.

According to the Mitákshará School also, two or more persons jointly inheriting property by the rules of inheritance, and not by birth, take it as tenants-in-common, to which survivorship does not apply. But to this rule an exception has been introduced by the Judicial Committee with respect to succession by two joint undivided brothers to their maternal grandfather's estate: 29 I. A., 156; see *supra* p. 189.

The Mitákshará has expressly laid down that two or more co-widows jointly inheriting their husband's estate shall take the some by *dividing* it,—in the following passage accidently omitted by Colebrooke in his translation of the work:—

एकवचनञ्च जात्यभिप्रायेण, अतश्च बह्व्यश्चेत् सजातीया विजातीयाश्च, यथांशं विभज्य धनं गृह्णन्ति ।

which means,—"The singular number (of the term lawfully wedded wife in the text of Yájnavalkya on succession, Text No. 1 *supra*, p. 282) has been used to imply the class, hence if there be more wives than one, whether of the same caste or of different castes, they shall take the property dividing the same according to their shares."

This is in conformity with the Mitákshará doctrine that the inherited property becomes the *strídhan* of the female heirs.

Partition is an incident of the joint heritage; in fact, *partition of heritage* is the name given by Hindu lawyers, to the law of inheritance.

Partition by two or more joint female heirs is expressly laid down by the commentators.

It is no doubt true, that when the female heirs take the Hindu widow's estate, the share which may, on partition, be allotted to any one of them, will, on her death during the life-time of the others, pass to the latter as being the then next taker or reversionary heir of the last male owner.

But this devolution is mistaken for passing by *survivorship*; and consequently the tenancy of the female heirs is deemed to be an unseparable joint-tenancy in those cases in which they take the *widow's estate* according to the Dáyabhága.

And as a consequence of this doctrine, an opinion has been expressed that although the joint female heirs may come to an arrangement whereby they may separately hold and possess portions of the property in proportion to their shares, for convenience of enjoyment, yet there cannot be between them a legal partition or division of title, so as to defeat their survivorship; 11 M.I.A., 487. Hence, although there cannot be an absolute partition, yet an order for separate possession may be made, when that is the only likely means to secure peaceful enjoyment, *Gajapathi* v. *Gajapathi*, I.L.R., 1 M., 290 = 4 I.A., 212. But a co-widow has not an unqualified right to claim separate possession. It is discretionary with the court which may allow it only in those cases where in the circumstances separate possession appears necessary for securing equal enjoyment: *Musst. Dal* v. *Mt. Panbas*, 8 W.N., 658.

In the case of *Amritalal* v. *Rajanikanta*, 2 I.A., 113, the same principle has been applied though it was a case governed by the Dáyabhága, one of the fundamental doctrines of which is, that co-heirs cannot but take as tenants-in-common.

The facts of this case were as follows:—Two married daughters jointly inherited their father's property, then one of

them became widowed and she was also sonless, subsequently the other died. The question was whether the surviving daughter who was a childless widow, could take her deceased sister's share in the father's estate. It was held that she could. And this conclusion was based on the principle of joint-tenancy and survivorship.

But the conclusion may without involving the above principle, be justified on the ground that the question whether the surviving daughter was competent to become the heir to her father was determined when the succession opened to her at first, and the character of heirship having been once impressed on her, it could not be taken away by any subsequent event, and therefore she as her father's heir could not be prevented from taking her sister's share any more than be divested of her own share.

Nor does the principle of survivorship seem to be equitable in all cases. Take for instance a case in which a man dies leaving two maiden daughters and one married daughter having sons; the maiden daughters inherit to the exclusion of the married one, then one of them is married and subsequently becomes a widow without sons, and afterwards the maiden daughter dies leaving the two sisters, one of whom is a childless widow, and the other having sons. According to survivorship the former alone would take the deceased sister's share, but according to the rule of inheritance both would take it: and the latter alternative appears to be acceptable for several good reasons.

Another consequence which is sought to be deduced from the doctrine of co-widow's inseparable joint-tenancy, is the incapacity of either to alienate her share without the consent of the other: *Kathaperumol* v. *Venkabai*, I.L.R., 2 M., 194. A compulsory sale in execution of a decree personally against one of the co-widow's, of her share, however, has been held valid during her life: *Ariyaputri* v. *Alamelu*, I.L.R., 11 M., 304.

A co-widow's power of alienation over her undivided interest in a particular property appertaining to her husband's estate, came to be considered by a Full Bench of the Calcutta High Court in the case of *Janikinath Mukhopadhya* v. *Mothuranath Mukhopadhya*, I.L.R., 9 C., 580, and it has been held that the purchaser is entitled to enforce a partition as against the other widow, which should be carried out in such a way as not to be detrimental to the future interests of the reversioners.

The tenure of co-heirship was held to be the same between the female co-heirs as between male heirs.

In the case of *Sri Gajapathi* v. *Maharani*, I.L.R., 16 M., 1=19 I.A., 184, governed by the Mitákshará, it has been held by the Privy Council that a mortgage by one of two co-widows, of part of the husband's estate jointly inherited by them, is not binding on the estate in the possession of the surviving widow after the death of the mortgagor, inasmuch as the mortgage was not so framed as to bind the same. And an opinion is also expressed that such a mortgage even for legal necessity, will not be binding on the estate so as to affect the interest of the surviving widow.

When one of two co-widows in separate possession of their husband's property by an agreement between them, sold some property for paying off costs of litigation relating to property in her possession, the sale was held to be valid and binding on the co-widow whose implied authority was presumed: *Mahadevappa* v. *Basagawda*, I.L.R., 29 B., 346. An alienation by one of two co-widows for paying off a money decree binding on the estate is not *ipso facto* invalid with reference to the interest of the other widow or of the reversioner: *Subbammal* v. *Avudaiyammal*, I.L.R., 30 M., 3.

Equity appears to require that a female co-heir should be held to have same rights over her share, as if she had been the sole heir, and her share, the only property, of the last full owner, and that the succession of the surviving co-heir to her share does not differ in any respect from the succession of a remoter female heir such as that of the daughter or the mother, after the widow and the like.

Liability and Alienation.

There are certain charges on the inheritance, namely, the debts due by the deceased, the maintenance of certain persons already mentioned, the marriage of the unmarried daughter and sister, and the like. When the widow or any other female becomes heir having a limited interest, the question arises whether she is bound to meet the charges for which the estate is liable, from the income, or is entitled to throw the burden on the corpus. It has been held that a widow is not bound to pay off the debts and the costs of marriage of maiden daughters from the income: I.L.R., 31 C., 433=8 W.N., 408. The question however, is not free from difficulty having regard to the rule prescribing moderate enjoyment by the widow.

For, although the rule has not been strictly enforced, owing to the difficulty in determining what enjoyment would be moderate or otherwise, yet it indicates the nature of the widow's right to the income, and has given rise to the restriction on the widow's power of disposal over accumulations, and acquisitions by means, of her savings: *infra* p. 438. The widow's liability for rent, Road-cess or the like ought to be regarded as her personal liability, and ought not to be held as attaching to the reversion, unless the tenure itself was sold under the special provisions of the Rent Law or the like: *Jiban* v. *Brojo*, 30 I.A., 81 = 30 C., 550 = 26 C., 285; *Srimohan* v. *Brijbehari*, I.L.R., 36 C., 753.

It should, however, be observed that assuming that the widow is not bound to liquidate the husband's debts from the income, yet she as heiress is entitled only to the residue left after payment of the debts. If she does not liquidate the debts by the sale of a portion of the corpus, she must pay the interest accruing due after the husband's death, from the income, inasmuch as the balance left after the payment of interest represents the true income, to which she is legitimately entitled. She cannot throw the entire burden on the reversion by renewing the bond for the debt from time to time by adding interest to the principal, and so keep alive the debt. Suppose the husband mortgaged his properties: the widow as heiress is entitled to the properties subject to the mortgage whereby the mortgagee acquires an interest in the properties, and the mortgagee's interest being predominant the income accruing out of the properties should properly be applied to pay the interest on the mortgage, and the balance only, if any, may be appropriated by the widow who cannot claim to have the whole income by virtue of her right as heiress, although she realises the same, and although the whole estate is vested in her, still it is subject to the right of the mortgagee who also has an interest in the property pledged. Besides, her right of alienation and also her right of enjoyment being restricted, her interest is practically alike to a life-interest.

The entire estate being vested in the widow, she is competent to deal with the same as a prudent owner would do. As regards the management of the estate inherited by a widow or other female heir, her power has been held by the Privy Council to be similar to that of the manager of an infant's estate, by applying the principles of *Hunooman Persaud Panday's* case to alienations made by her: *Kameswar* v. *Run*,

I.L.R., 6 C., 843. Purporting to follow this decision it has been held that a permanent lease at a fixed rent granted by a widow, and found by the lower Appellate Court to be for the benefit of the estate, is valid and cannot be set aside by the reversioner: *Daya* v. *Sri*, I.L.R., 33 C., 842.

It is, however, doubtful whether a widow is competent under the aforesaid decision of the Judicial Committee to grant a permanent lease, specially one at a fixed and invariable rent, without legal necessity; and whether such a lease is or is not for the benefit of the estate, is a pure question of fact. An alienation by a widow can be justified only by legal necessity which involves the idea of some pressure from without, and not merely a desire to better or develop the estate, which implies very large powers that may lead to speculative ventures. It has accordingly been held that a widow can alienate immoveable property, in order to preserve the estate, but not merely to improve it: *Ganap* v. *Subbi*, I.L.R., 32 B., 577; *Abhiram* v. *Shyama*, 14 W.N., 1. And a lease for 60 years granted by a widow in due course of management is held valid, in the circumstances, the arrangement being accepted by the family. The reversioners cannot ratify a lease granted by a widow, but they may elect to affirm it, or treat it as nullity, and the institution of a suit would show election to treat it so: *Bijoy* v. *Krishna*, I.L.R., 34 C., 329; *Sankar* v. *Bijoy*, 13 W.N., 201. A lease granted by her is not *ipso facto* void but only voidable: I.L.R., 21 B., 749. She may work mines and quarries and fell timber, unless her acts amount to destruction of property: I.L.R., 22 M., 126. One of two widows may give up her right of survivorship to the share allotted to the other on a partition between them: I.L.R., 22 M., 522.

A widow may sell her life-interest without any legal necessity, and even for legal necessity life-interest only may be sold, (13 W.N., 353 = 9 L.J., 88); and she is competent to transfer, with the consent of the presumptive reversioner, her husband's estate, either in whole or in part, without any cause justifying the transfer: *Pulin* v. *Bolai*, I.L.R., 35 C., 939. But a female reversioner's consent would not be effectual: *Bipin* v. *Durga*, 35 C., 1086. See *infra p.* 446.

The widow alone is also competent to absolutely alienate the property for certain religious purposes and for necessity. These are as follows:—

1. Payment of the husband's debts:—it being conducive to his spiritual benefit, she is justified in alienating for the

purpose of paying off even debts barred by limitation: *Udai* v. *Ashu*, I.L.R., 21 C., 190. But payment of her husband's debts during his lifetime by a wife with her own money is deemed to be a voluntary payment in the absence of evidence to the contrary, and will not support an alienation by her after his death: *Himmat* v. *Bhawani*, I.L.R, 30 A., 352.

2. The performance of his exequial rite as well as that of his mother and the like: I.L.R., 5 B., 450; 22 B., 818; *Vrij* v. *Bai*, 32 B., 26.

A daughter inheriting her father's property may alienate a portion of the property for defraying the expenses of her mother's Sradh: *Srimohan* v. *Brijbehari*, 36 C., 753; 7 W.R., 146—(head note of this case is wrong owing to mistakes in the judgment as reported.)

3. Religious purposes, especially pilgrimage to Gya for performing his *sraddha* there: *Collector* v. *Cavaly*, 8 M.I.A., 529 (550) = 2 W.R., 59; 20 W.R., 187. The *bona fide* lender is not affected by subsequent non-application of the money to the purpose for which it is taken: 2 C.L.R., 474; I.L.R. 21 C., 190. Only a small portion of the property may be alienated for a pious purpose of her own: *Ram* v. *Ram*, I.L.R., 22 C., 506. Pilgrimage to Benares is not a legal necessity: *Hari* v. *Bajrang*, 13 W.N., 544.

4. Maintenance for herself and of those who are entitled to it out of the estate, such as his mother, paternal grandmother, maiden sister and daughter, and the like.

5. Marriage of his maiden sister, daughter, son's daughter, grandson's daughter and the like; the marriage of relations such as these is conducive to the husband's spiritual benefit: see texts Nos. 12 and 14-16 in Chapter on Marriage, pp. 80 and 81, and I.L.R., 6 C., 36; 16 W.R., 52. Gift to a son-in-law on the occasion of the daughter's marriage, of a portion of the property, reasonable in extent, is held valid: *Rama* v. *Vengidu*, I.L.R., 22 M., 113. Gift of an immoveable property by the widow to her daughter at her *Gowna* ceremony is held valid: *Churamon* v. *Gopi*, 13 W.N., 994=10 L.J., 545.

A daughter inheriting her father's estate is competent to alienate the same for the purpose of raising money to meet the expenses of her daughter's marriage, when her husband is not possessed of sufficient means to do so: *Rustam* v. *Moti*, I.L.R., 18 A., 74.

6. Preservation of the estate by payment of Government Revenue and the like. And

7. Costs of any litigation respecting the estate, such as are incurred for defending her title to it, (I.L.R., 12 C., 52; 31 A., 497 = 13 W.N., 1117; 9 L.J., 346), or defending herself in a criminal case with respect to a Kabuliyat taken from a tenant in the course of management of the estate by herself and co-sharers, but charged by the tenant to be a forgery: *Nobin* v. *Kherode*, 6 W.N., 648.

There is a distinction between a mortgage and a sale; for while the exact amount actually necessary may be borrowed; there may not be any property the value of which is equal to the amount necessary to be raised, so that a sale often covers property of larger value, and is valid if the difference be not disproportionate: *Lulleet* v. *Sreedhur*, 13 W.R, 457.

The reversioner cannot recover the property sold for legal necessity, even by offering to pay to the purchaser the amount raised: 9 W.R., 284; 4 W.N., cciv. But in a case of excessive sale, he is competent to have it set aside by paying the amount which the widow was entitled to raise; and he must offer to pay the same, otherwise his suit would fail: *Phool* v. *Rughoo*, 9 W.R., 108; *Muttee* v. *Gopaul*, 20 W.R., 187; *Shumsool* v. *Shewukram*, 2 I.A., 7 = 22 W.R., 409; *Sadashiv* v. *Dhakubai*, I.L.R., 5 B., 450; *Gobind* v. *Baldeo*, 25 A., 330; 8 W.N., 408; *Deputy Com.* v. *Khanjan*, 34 I.A., 72 = 29 A., 331; *Singam* v. *Draupadi*, 31 M., 153.

A lender or a purchaser dealing with a Hindu widow, is, like one dealing with a manager, bound to enquire into the necessities for the loan or the sale: *ante* p. 231. The onus lies on him to prove justifying necessity: *B. Kameswar* v. *Run Bahadur*, 8 I.A., 8 = I.L.R., 6 C., 843. But her case differs from that of the manager or head of an undivided family who manages an ancestral trade and has a certain power to pledge for the requirements of the business: restriction on her power of alienation is not relaxed on account of the trade, the validity of the charge must be proved. Absence of necessity need not even be pleaded by the reversioner: 25 I.A., 183 = I.L.R., 21 A., 71.

Besides, a person dealing with a Purdanashin lady, must take care to see that the transaction is honest and *bona fide*, that the deed, and the power (should there be one), were fully explained to, and understood by, her before execution, and that she had disinterested and independent advice, and was free from undue influence: *Tacoordeen* v. *Nawab*, 1 I.A., 192 = 21 W.R., 340; *Sudisht* v. *Mt. Sheobarat*, 8 I.A., 39 = I.L.R., 7 C.,

245; *Wajid* v. *Raja Ewaz*, 18 I.A., 144 = I.L.R., 18 C., 545; *Annoda* v. *Bhuban*, 28 I.A., 71 = 28 C., 546. It is not enough that the deed was read out to the lady, but it should also be proved that it had been explained to her, and that she had understood it: *Shambati* v. *Jago*, 29 I.A., 127; *Bhagwat* v. *Debi*, I.L.R., 35 C., 420 = 12 W.N., 393.

Accordingly, where a widow borrowed on mortgage, under necessity, the stipulated interest which was found to be exorbitant and unreasonable, was reduced: *Hurronath* v. *Rundhir*, 18 I.A., 1 = I.L.R., 18 C., 311.

An alienation by a widow is not to be deemed to become void on her death, though neither legal necessity nor the reversioner's consent be established, so as to entitle a party other than the reversioner, to deny the purchaser's title on that ground: *Kishori* v. *Sheikh*, 14 W.N., 106.

Accumulations and Acquisitions.

According to the Dáyábhága, the widow is to live a life of austerity, she must not partake of rich food or wear delicate apparel, and enjoy with moderation the husband's estate inherited by her; it follows therefore by necessary implication that she must accumulate the surplus income for the benefit of the husband's next heirs. But our Courts felt a difficulty in determining what is intended by moderate enjoyment as there is no restriction on her liberty to expend for religious and charitable purposes the whole of the balance of the income left after her moderate *personal* enjoyment. So they left it to the discretion of the widow herself; and accordingly it was held that when the estate is large and the income thereof is more than sufficient for meeting all the legal expenses, the widow is at perfect liberty to dispose of the surplus income in any way she pleases; she is not bound to save. But if she saves and makes no attempt to dispose of the savings or accumulations in her life-time, they will follow the corpus of the estate and go to her husband's heirs after her death, and not to her own heirs.

As regards her competency during her life to deal with accumulations, a difficulty has arisen in consequence of the conflict between the original view of the widow's restricted right of enjoyment, according to which she was considered incompetent to alienate without legal necessity what had already been accumulated by her moderate enjoyment of the income, and the modern view of the widow's power of alienating even the whole of the husband's estate, such alienation being valid and

operative during her life, even when made without any legal necessity. Hence has arisen a distinction between an accumulation amounting to an accretion to the estate, and an accumulation being simply income held in suspense for expenditure, 25 W.R., 335. It is difficult to fix the line which distinguishes accretions to the husband's estate from income held in suspense in the widow's hands, as to which she has not determined whether or not she will spend it. If the widow acquires immoveable property with the savings of the surplus income, and makes in no way any distinction between the original estate and the acquisitions, and treats such after-purchases as accretions to the original estate, she will be afterwards precluded from alienating the acquisitions except for legal necessity. In the cases of *Isri Dutt Koer* (I.L.R., 10 C., 324) and *Sheolochan Sing* (14 C., 387) the rule laid down by the Privy Council is, that when a widow not spending the income of her husband's estate, acquires immoveable property with her savings, and makes no distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. In both these cases the widow attempted to alienate both descriptions of property by one transaction, and had not previously dealt with the after-purchases in any way.

So the original view is now confined to the acquisition of immoveable property when there is nothing to show her intention to keep it separate.

The Bengal doctrine is not applicable to cases under the Mithila School, where the widow is entitled to the moveables absolutely, and not to the entire income of the immoveable property.

Waste.

If the widow commits any waste in respect of her husband's estate, she may be restrained by the presumptive reversionary heir by a suit. But the principles which are applied in Courts of Equity in England for securing in the public funds any property to which one person is entitled in possession, and another is entitled in remainder, are not applicable to the property in possession of a Hindu widow: in order to induce the Court to interfere, it is necessary to show that there is danger to the property from the mode in which the widow is dealing with it,

or apprehension of waste: 6 M.I.A., 433; I.L.R., 31 C., 214= 8 W.N., 11

When she alienates any property belonging to her husband in excess of her power, the then next heir of the husband may during her life bring a suit for a declaration that the alienation, either in whole or in part, is invalid after her life.

Thus the reversioner's interest is not so fully protected, as it is under the provisions made by the Dáyabhága for the control by the husband's kinsmen over the widow's management.

When cash, or moveable property easily convertible into cash, appertaining to the husband's estate comes to the widow's hands, it would be almost impossible for the reversioner to get any remedy in most cases, if the court would not interfere unless he could prove danger to the property from the *mode* of her *dealing* with it: for she may secretly deal with such property so as to deprive the reversioner entirely. The danger apprehended is the gift to the widow's own relations, of which no trace can be found by the reversioner. In such cases, it seems reasonable to presume danger without waiting for the mode of dealing, and to apply those equitable principles, and to allow the widow permission to negotiate for the purpose of more profitable investment when the same is available, with the sanction of the court.

Judicial Proceedings.

It has already been said that the widow represents the whole estate of her husband, which is entirely vested in her, no one else having any present interest in the estate before the termination of her interest. It is only after the termination of her estate that the actual reversioner or the next heir can be ascertained. To a suit respecting the husband's estate she alone is entitled to be a party as representing the estate; and a decree fairly and properly obtained against her will bind the reversioners. The following observation of the Privy Council in the *Shivaganga* case lays down the rule on the subject:—"The same principle which has prevailed in the Courts of this country as to tenants-in-tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." See also the case of *Protabnarayan Sing* (I.L.R., 11 C., 186) in which, following the above principle, the Privy Council held that a decree

properly obtained against the widow operates as *res judicata* against the reversioners.

In order that a decree against the widow may be binding on the reversioner, it is necessary that it should be passed after a fair trial, after full contest in a *bona fide* litigation, but not one based on a compromise: 9 M.I.A., 543; I.L.R., 28 A., 241; 21 C., 8; 30 A., 75; 29 A., 487; 7 C.L.R., 76, 81.

But when the claim is binding on the estate then the decree on it without contest by the widow is binding on the reversioner, the widow representing the estate was not bound to raise any defence when the debt was really due: I.L.R., 30 M., 3.

There is, however, no presumption that a property found to be in possession of a Hindu widow who inherited considerable property left by her husband, belonged to the husband: *Diwan* v. *Indar*, I.L.R., 26 C., 871.

It was formerly held under the old Limitation Act that possession adverse to the widow was also adverse to the reversioner. But it has been held that the law has been changed since the passing of the Limitation Act of 1871, and the reversioner is entitled to twelve years from the death of the widow, I.L.R., 9 C., 934. This ruling, however, seems to be inconsistent with the decision of the Privy Council in the case of *Hurrinath Chatterjee* v. *Mohunt Mothur*, 20 I.A., 183 = I.L.R., 21 C., 8, in which a suit by a daughter to recover her share of her father's estate had been dismissed only on the groud of limitation, and a subsequent suit by her son after her death was held to be barred by the principle of *res judicata*. But the doubt created by this case is removed by the decision of the Judicial Committee in the case of *Runchordas* v. *Parbati*, in which the reversioner was the plaintiff, and their Lordships held that Articles 141 and 120 of the present Limitation Act applied respectively to immoveable and moveable properties, and with respect to the argument based on Section 28 of the Act their Lordships observed—"The obvious answer to this argument is that in this case the period limited is not determined. It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his:" 26 I.A., 71, 82.

Here again the same difficulty may arise as in a suit against the Mitákshará father alone, for a debt due by the whole family, —the difficulty in fact of distinguishing between proceedings

against the widow personally, and those against her as representing the whole estate. In execution of a decree against the widow for a debt contracted for legal necessity, the right, title and interest of the widow may be sold according to our Civil Procedure, and the question may arise what was purchased, the whole estate, or the life-interest of the widow? and it will have to be decided by the application of substantially the same principles as have been laid down in the case of a Mitákshará father.

Thus, where a widow's estate was sold in execution of a decree against her personally, for arrears of maintenance payable by her, which was a charge on the estate, it has been held that only the widow's interest passed to the purchaser: *Baijun Doobey* v. *Brij Bhookun*, 2 I.A., 275 = I.L.R., 1 C., 133 = 24 W.R., 306.

But in another case in which the widow's right, title and interest only was sold in execution of a decree, it has been held that the court is at liberty to look to the judgment to ascertain what was sold thereunder, and that as it appeared from the judgment that the decree against the widow was in respect of the husband's estate and bound the reversionary heir, the purchaser took the estate absolutely: *Jugalkisor* v. *J. M. Tagore*, 11 I.A., 59 = I.L.R., 10 C., 985.

In ascertaining what was purchased at a sale in execution against the widow, the real question is what was liable to be sold under the decree, and what in fact was sold; and for the purpose of ascertaining what estate was intended to be affected by the decree, the pleadings may be looked at by the Court, to see the nature of the suit and the character of the relief actually claimed: *Srinath* v. *Hari*, 3 W.N., 637; *Braja* v. *Joggeswar*, 9 L.J., 346.

When the husband's property is sold in execution of a decree for money lent on the widow's personal security only, though for legal necessity, the purchaser would be entitled to the widow's life-interest only: 12 W.N., 769; I.L.R., 30 A., 394.

Partition with husband's co-parceners.

Although right to partition is an incident of joint ownership, and every joint owner of property is, as a general rule, entitled to obtain partition, or in other words, to be placed in a position to enjoy his own right separately and without interruption and interference by his co-sharer, (*Hemadri* v. *Ramani*, I.L.R., 24 C., 575, 580), yet two or more widows or daughters

who have only a limited interest in the property jointly inherited by them cannot have the right to claim partition in the sense of division of title, neither can they have an unqualified right to claim partition in the sense of division of possession, as the same may be a temporary arrangement only. It is therefore discretionary with the Court to allow it or not: and it would be allowed if in the circumstances separate possession appears necessary for securing equal enjoyment to each of them. Still it should be carried out in such a manner that it may not be detrimental to the future interests of the reversioners: *Janaki* v. *Mothura*, I.L.R., 9 C., 580, 586.

As regards the widow's right of partition against her husband's co-parceners, the same rule applies, that is to say, it depends on the discretion of the court whether partition should be allowed or not. There are two descriptions of cases: one, in which the husband's coparceners are the reversioners; and the other, in which the husband's daughter and daughter's sons are the reversioners. In the latter, there cannot be any objection to partition. But as regards the former in which the husband's estate is to go after the widow's death to the same co-parceners against whom the partition is claimed, the advantage to the widow from separate enjoyment of her share, and to both parties from the cessation of disputes and disagreements, is often counterbalanced by the expenses and trouble attending the temporary severance. Hence the court may without division by metes and bounds, decree separate possession and enjoyment in such a mode that the reversionary interest may not be prejudicially affected: *Soudaminy* v. *Jogesh*, I.L.R., 2 C., 262, 271; *Janoki* v. *Mothura*, 9 C., 580, 586; *Mahadeyi* v. *Haruk*, 9 C., 244, 250; see also 12 C., 212; 6 B.L.R., 143, 747, 750; Boulnois 139; 6 M.I.A., 433; 8 W.N., 658.

Where in a partition there is reasonable apprehension of waste of *moveables* and cash, provision should be made in the final decree for prevention of waste; a separate suit for injunction is not necessary: *Durganath* v. *Chinta*, I.L.R., 31 C., 214 = 8 W.N., 11.

Reversioner.

Reversioner.—You will bear in mind that the term reversioner as used in Hindu law, bears a sense different from its ordinary meaning, for a Hindu reversioner has no present interest in the property, the actual reversioner may be a person different from the presumptive reversioner and his heirs: the

terms 'the next heir of the last full owner,' or 'the then next taker or heir' may be used instead of the above expression. A female heir may be a reversioner or the next heir, having a qualified estate. There appears to have been some misconception about the matter. It had to be settled by a Full Bench that when a maiden daughter succeeds in preference to her married sisters, and after marriage dies leaving a son, the estate will go to her qualified sister as the next reversioner in preference to her son: (I.L.R., 9 C., 154).

The Reversion—of the so-called presumptive reversionery heir is mere *spes successionis* or chance of succession to the widow's husband's estate, in case he becomes the actual reversionery heir to the husband on the widow's death,—the widow's life being deemed as the continuation of her husband's life for the purpose of determining his heir on her death, when the succession opens. Hence it is not transferable, and a conveyance executed by the reversionery heir in the widow's life-time must be inoperative: (T. P. Act, § 6; I.L.R., 29 C., 355; 29 M., 120; 32 M., 206). But an agreement between two reversioners to divide the reversion when falling in, may be the subject of specific performance: 30 M., 486.

Surrender.—A female heir may surrender or, properly speaking, withdraw her life-estate, and destroy her rights, so as to accelerate succession and vest the property in the then next heir, in the same way as if she were dead at that time: (I.L.R., 5 C., 732). It is worthy of special notice that by the so-called deed of surrender, all that the widow should do, is to declare that she feels no desire for exercising rights of ownership over her husband's estate, and so she gives up her rights therein and possession thereof; and to declare that her interest being thus withdrawn and destroyed, the immediate reversioner becomes entitled to the estate by the operation of the law of inheritance, but not by any act of transfer made by herself. This is *bona fide* done when the person to whom the deed is addressed, and in whose favour the relinquishment operates, is also her own relation, for instance, when the surrender is made by the widow in favour of her own son, or daughter, or grandson. In all other cases it is a mere pretext for an arrangement whereby the property is divided between the last owner's relations and the widow herself, the latter getting her share absolutely, so that she might give the same to her own relations.

The rule originated from the doctrine that the retirement from the world, or the extinction of one's desire for property, is,

according to Hindu law, civil death, and causes, in the same way as natural death, the extinction of his rights in property, and has the effect of accelerating inheritance. And because retirement from the world, or renunciation, depends on the will of the person, therefore it has been held that without the remotest idea of retiring, or renouncing, the widow may do that which would follow from her actual retirement or renunciation.

But in order to accelerate the inheritance of the reversioner, the widow must convey her estate absolutely: hence where a widow executed a deed in favour of a daughter's son, reserving her life-interest and declaring him to be entitled to the estate after her death, it has been held that there was no surrender at all, and therefore no title accrued to him so as to exclude another daughter's son: *Behari* v. *Madho*, 19 I.A., 30=I.L.R., 19 C., 236.

Following the analogy of an adoption in Bombay, made by a widow without any authority, it has been held that the validity of a *surrender* by her cannot be called into question on the ground of improper motive, or of any condition being imposed by her: accordingly where a widow conveyed the whole of her husband's estate to the next reversioner, in consideration of an undertaking by him to reconvey a portion of the property to her brothers, the conveyance is held to be good and valid, as well as that executed by him in favour of her brothers, neither of which can be impeached by other reversioners: *Choola* v. *Palury*, I.L.R, 31 M., 446.

Surrender and reconveyance.—Where, however, a widow relinquished the whole estate in favour of the then reversioner, and the latter made an absolute gift of half the estate to the widow to enable her to make a provision for maintenance of a son adopted by her, whose adoption had been declared invalid in a suit by the reversioner, it has been held that the relinquishment is valid as to one-half of the estate, and invalid as to the other half reconveyed to the widow. It is difficult to follow the principle of the distinction; for the widow intended really to relinquish one-half *in consideration* of getting an absolute title to the other half: *Hemchunder* v. *Sarnamoyi*, I.L.R., 22 C., 354.

In a recent case, however, this ruling is held to apply only when the conveyances formed parts of one and the same transaction, and therefore the conveyance by the reversioner to the widow, which is not established to have formed one transaction with the deed of surrender executed by the widow

in favour of the reversioner, is held to be not open to objection; *Kanu* v. *Kashi*, 14 W.N., 226.

But in another recent case, where the widow and the nearest reversioners executed a deed whereby the latter, in consideration of a portion of the estate being conveyed to them by the widow, did *bona fide* give up all their rights to the remaining portion, and consent to the disposal of the same by the widow according to her pleasure, it is held that the actual reversioners, who claim through the consenting reversioners, are *estopped* and bound by the consent of their father, upon the authority of the case of *Bajrangi Singh* v. *Manokarnika Singh*. (12 W.N., 74 = 35 I.A., 1,) although the learned judges were of opinion that the reversioners could not grant a general release of their reversionery right, with a view to enlarge the widow's power, and enable her to give an absolute title by prospective alienations: I.L.R., 31 M., 336. It is doubtful whether the actual reversioner who derives his right directly from the last full owner can be estopped by his father's consent, and whether *Bagrangi's* case really supports the view of estoppel : see *Bahadur* v. *Mohar*, 29 I. A., 1.

It should be observed that the widow and the nearest reversioner have been held to be competent to deal with the property in any way they please, when the person benefited is other than the widow. It is difficult to find any principle why the poor widow should be incompetent to acquire absolute title by the reversioner's consent.

Sale or Gift by Widow of a portion to Reversioner.—It should be noticed that the *acceleration of succession* by the widow's relinquishment of her rights in favour of the reversioner, must relate to the *whole* estate, upon the theory of retirement from the world, or renunciation or extinction of temporal affections or of desire for property, operating as *civil death*. But the gift or sale by the widow of a *portion* of her husband's estate, to the reversioner, has been held to convey an absolute title without any legal necessity whatever, and to be good and valid against the actual reversioner, 12 W.N., 49; 14 W.N., 22. The validity of such alienations rests upon a different principle, and not on the doctrine of surrender; in fact it would be erroneous to explain an alienation to, or by consent of, the reversioner by the fiction of surrender which in reality does not exist : 8 M.I.A., 500, 551; 13 M.I.A., 209, 228.

Alienation with reversioner's consent.—In some cases the validity of an alienation with the nearest reversioner's consent

is sought to be deduced from, or supported by, the widow's power of surrender or relinquishment of her interest in her husbands estate, causing the same to be vested in the nearest reversioner. But this is an effect of the civil death recognised by Hindu law, to take place on the happening of any one of three events, namely, (1) degradation for the commission of a heinous sin causing the guilty person to be outcasted, (2) adoption of a religious order, and (3) renunciation or extinction of worldly affections and desire for property; and civil death causes destruction of ownership in all descriptions of property whether it be her Stridhana or inherited by her, and opens succession to the next heir by accelerating inheritance. It should be borne in mind that the reversioner's ownership arises by the operation of the law of inheritance, and not by any act of transfer by the widow, who only destroys her interest, but does not cause the accrual of the next heir's ownership, except indirectly by accelerating succession. *Surrender* must therefore comprise the whole of the husband's estate; it can by no means explain alienation of a portion of property; nor is it at all necessary to rely on it for that purpose, as the two are unconnected according to Hindu law. Alienation with the *consent* of the husband's *kinsmen* is expressly laid down: but this rule raises the question, whether the consent of *all* or *some* of the kinsmen is necessary; and for the solution of this question reliance is placed on the doctrine of surrender by the widow's renunciation accelerating inheritance, and causing the estate to vest in the *immediate* reversioner, who is therefore deemed the *kinsman* to be principally considered as interested, and his *consent* must be taken to be necessary and sufficient by the intendment of law.

The conflict of decisions on this point, of the different High Courts, is mainly attributable to the erroneous view that the widow's act of withdrawing, destroying, or relinquishing, her interest, is the direct cause of the nearest reversioner's right, and that she may relinquish her rights in a portion only of the estate, and that this liberty to surrender a portion forms the foundation of the validity of an alienation with the immediate reversioner's consent. It would be convenient to consider the law of the Bengal school, first.

It is laid down in the Dáyabhága itself (D.B., 11, 1, 64,) that the widow may, with the consent of the husband's kinsmen, deal with his estate in any way; and the reason is, that they are her lawful guardians in default of the husband and the male

issue. This follows from her status of perpetual tutelage under the Hindu law (Texts Nos. 2 and 3), her supposed want of discretion being supplied by their *auctoritas*. It is only with their permission, that she may make any gift to her own relations on her father's or mother's side. This rule is supported by the authority of the following text of Nárada,—

मृते भर्त्तर्य्यपुत्रायाः पतिपक्षः प्रभुः स्त्रियाः ।
विनियोगेऽर्थरक्षासु भरणे च स ईश्वरः ॥
परिक्षीणे पतिकुले निर्मनुष्ये निराश्रये ।
तत् सपिण्डेषु चासत्सु पितृपक्षः प्रभुः स्त्रियाः ॥ नारदः ॥

which means,—"When the husband is deceased, the husband's kin are the guardians of his sonless wife: in the *disposal* and care of the property, as well as in (the matter of) maintenance, they have full power. But, if the husband's family be extinct, or contain no male, or be helpless, or there be no Sapinda of his, then the kin of her own parents are the guardians of the widow,"

While commenting on this text the author of the Dáyabhága says, that "*disposal*" means "gift and the like" which expression means and implies "gift, sale and mortgage," *i.e.*, any disposition of property.

This doctrine that the widow may with the consent of the husband's kinsmen deal with her husband's property, was acted upon by our Courts of Justice from the earliest times. But the difficulty which was felt for a long time, was, as to whether by "the consent of husband's kinsmen" is intended, the consent of all persons who may possibly be heirs of the husband, or the consent of the nearest or the presumptive reversionary heir.

This difficulty has now been removed by a Full Bench of the Calcutta High Court, who have held that the presumptive reversionary heir's consent is sufficient, because the widow may, by retirement or by renunciation cause the estate to be vested in the reversioner, and so he is the person to be principally regarded in this connection: *Nabakisor* v. *Hari Nath*, I.L.R., 10 C., 1102.

So it appears that the widow and the presumptive reversioner are together competent to deal with the property in any way they please. But when there are more reversioners than one, of the same degree, the consent of *all* is necessary, the consent of only one or some being of no legal effect: the alienation in

such a case is absolutely void: *Radha* v. *Joy*, I.L.R., 17 C., 896, and note 900. This decision has been approved by the Judicial committee in *Bajrangi's* case : I.L.R., 35 I.A., 1.

There cannot be any doubt so far as the Calcutta High Court is concerned, that a *portion* of the estate may be alienated by the widow with the presumptive reversioner's consent, so as to pass an absolute title : (*Pulin* v. *Balai*, 12 W.N., 837 = 35 C., 939). But the erroneous idea that *alienation* is founded on *surrender* has misled a division Bench of this Court to hold that a *mortgage* by a widow, though executed with the presumptive reversioner's consent, is not valid in the absence of legal necessity, because a mortgage cannot be deemed to be tantamount to *surrender*, by reason of her retaining an interest in the property mortgaged : (*Hari* v. *Bajrang*, 13 W.N., 544 = 9 L.J., 453). This case would be in conflict with the preceding one, unless *partial* surrender be admitted to be valid.

But the view taken by the Madras High Court that *surrender* to be valid must comprise the whole estate appears to be the correct view according to Hindu law, as has already been discussed. And if the validity of an alienation with the consent of the presumptive reversioner be taken to be founded on the doctrine of *surrender*, then an alienation to be valid must comprehend the whole estate, as has been held by the Madras High Court; and accordingly it has been held that an alienation of *apart* of the estate, with the then reversioner's consent is not binding on the actual reversioner, if other than the consenting person : (I.L.R., 21 M., 128 ; 29 M., 120 ; 31 M., 366 ; 32 M., 206.) There is no doubt that *surrender* must include the whole estate, (19 C., 236, 241), but alienation is founded on a different principle under the Hindu law, and may be made of a portion of the estate with the next heir's consent : see *Bajrangi's* case, 12 W.N., 74 = 35 I.A., 1.

The Bombay High Court (25 B., 129,) does not go so far as to accept the view that finds favour in Calcutta, as observed by the Chief Justice Sir Lawrence Jenkins, but appears to adopt a qualified view having regard to the following observation of the Judicial Committee, namely, —"Their Lordships do not mean to impugn the authorities, etc., which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such cases must be generally understood to be all those who are likely to be interested in disputing the transaction :"—(*Raj Lukhee* v. *Gokool Chunder*, 13 M.I.A., 209, 228=12 W.R., 47 ;) and accordingly

it is held that a sale was validated by the consent of a person who was at the time the only male reversioner in existence.

The Allahabad High Court, however, did not recognise the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner: (I.L.R., 6 A., 116, and 288). But this view has been disapproved by the Judicial Committee in *Bajrangi's* case (35 I.A., 1), in which their Lordships hold that an alienation by the widow with the reversioner's consent is valid in all the Schools, and "agree with the High Court of Calcutta—*Radha Shyam* v. *Joy Ram* (17 C., 896) —that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible." And their Lordships further hold "that it is immaterial that it (the consent) was given after the execution of the deeds" whereby portions of the estate were successively alienated, on the principle—"*Omnis ratihabitio retrotrahitur et mandato priori acquiparatur*"—*i.e.*, Every subsequent ratification has retrospective effect and is equivalent to prior command.

This decision lays down for the first time an important principle, namely, that the reversioner's consent need not be given at the time of the alienation by the widow. If subsequent ratification is sufficient for validating a previous alienation, then arises the question whether a prior consent can validate a future alienation? in other words, will consent have prospective as well as retrospective effect? There seems to be no difference on principle between the two.

The reversioner ordinarily gives his consent by joining the widow in executing the deed of transfer, or by attesting the deed reciting his consent to the transfer, when he is aware of its contents: (*Sham* v. *Achhan,* 25 I.A., 183, 189). But mere attestation is not necessarily equivalent to consent; (*Abhay* v. *Attar*, 13 W.N., 931,) nor is a reversioner estopped by signing the deed, from disputing the validity of an alienation made by the widow: (*Lala Rup* v. *Mt. Gopal,* 13 W.N., 920). But it is a question of fact, and may be proved otherwise than by a writing; it must be established that the reversioner consented to the destruction of his reversionery interest, in consideration of deriving some benefit by the transaction. Accordingly, where a widow sold a portion of her husband's estate through the presumptive reversionery heir who acted as her Mukhtiar, but

who did not receive any portion of the consideration, it is held that although it was stated in the deed that—" the vendor has become absolute owner of the share sold from the date of sale"—yet there being no evidence of necessity, the widow's life-interest only passed, and therefore the then reversioner's grandson who was the actual reversioner was entitled to eject the purchaser : *Jiwan* v. *Misri*, 23 I.A., 1.

Declaratory suit by reversioner female and male.—It has already been said that when a widow alienates without legal necessity or alienates more property than what is necessary for raising the amount required, the presumptive reversioner may bring a suit for a declaratory decree, though his interest is merely a contingent one : *Raj* v. *Gokool*, 13 M.I.A., 209; *Goolab* v. *Rao*, 14 M.I.A., 176; *Jumoona* v. *Bama*, 3 I.A., 72. Execution of a will by a Hindu widow was, for special reasons, considered to afford sufficient ground for granting a declaratory decree to a presumptive reversioner : 31 I.A., 67. But where the immediate reversioner has fraudulently colluded with the parties to the alienation, or is unwilling to take the trouble, or is a female who herself has but a qualified interest and could not even by joining in the act of alienation give an absolute title, the remote reversioner may bring such a suit : *Abinash* v. *Hari*, I.L.R., 32 C., 62=9 W.N., 25; and see cases cited therein.

An actual reversioner is not affected or bound by laches or contract of a presumptive reversioner, even when the former is related to the last full owner through the latter : *Bhagwanta* v. *Sukhi*, I.L.R., 22 A., 33. In this case a Full Bench of the Allahabad High Court reviewed all the previous decisions, and held that one reversioner does not derive his title from another even if that other be his father, but he derives his title from the last full owner. If, therefore, the right of the nearest reversioner for the time being, to contest an alienation or adoption is allowed to be barred by limitation as against him, this will not bar the similar right of a remoter reversioner. But the period of limitation for instituting a suit for declaring the invalidity of an alienation being twelve years from the date of the alienation, should the same be allowed to elapse by the reversioner, then no new cause of action can arise after his death to a remoter reversioner who may bring a suit for possession after the widow's death, though barred as regards a declaratory suit : *Mt. Mesraw* v. *Girja*, 12 W.N., 857.

In the case of *Bahadur* v. *Mohar*, (29 I.A., 1, 8-9,) in which a certain arrangement between a widow and the then reversionary

heirs was contended to be binding, as a contract, on the actual reversioners who were the appellants before the Judicial Committee, their Lordships made the following observations,—"assuming that this arrangement ** amounted to a contract between the then claimants and Pritu (the widow), such a contract is not binding on the appellants (actual reversioners.) According to Indian law, the claimants of 1847 were but expectant heirs with a *spes successionis.* The appellants claim in their own right as heirs of Mohar, when the succession opened, and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces descent."

It is worthy of remark that this ruling does not affect the validity of an alienation by a widow with the consent of the then next heir of her husband, in the absence of legal necessity; for, in the later case of *Bajrangi Singh,* (35 I.A., 1) the law on this subject has been reviewed, and such alienations are laid down to be valid in all provinces. There are some cases in which the actual reversioner is held affected by the laches of presumptive reversioners: 15 W.R., 1; 23 W.R., 42 and 285; I.L.R., 27 C., 379, 403; 14 B., 12; 260, 266.

Effect of declaratory decree in such suit.—The specific Relief Act provides for declaratory decrees in Section 42, and then lays down in Section 43 that a declaration made by the court in a suit for a declaratory decree is binding only on the parties to the suit and on persons claiming through them respectively. Hence it follows that as one reversioner does not claim through another, one cannot be bound by such a decree in a suit by another. In *Jumoona* v. *Bama,* (3 I.A., 72, 84) the Privy Council expressed a doubt as to whether a decree in favour of an adoption passed in a suit by a reversioner to set it aside, would be binding upon any other reversioner. In a later case by the presumptive reversioner to set aside an alienation, their Lordships indicate strongly that such a decision would not be binding as *res judicata* on a new reversioner: *Isri* v. *Mt. Hansbutti,* 10 I.A., 150, 157=I.L.R., 10 C., 324, 333. So in a recent case for declaration, that a will in which an issue was raised and decided as to the position of the plaintiff as next reversionary heir, their Lordships pointed out in order to guard against any possible misapprehension, that the present decision will have settled nothing as to who would succeed, when the inheritance opens by the death of the widow, the issue being decided only between parties to the suit: *Thakurain*

v. *Bhaiya*, 31 I.A., 67, 70. But the Madras High Court has taken a different view with respect to the binding character of decrees in declaratory suits relating to adoptions: see *ante* p. 177.

Suit for possession after widow's death.—After the widow's death, the then heir of the husband or the actual reversioner is entitled to recover possession by ejecting the purchaser, of any property alienated by the widow without legal necessity, or without the presumptive reversioner's consent, whether the property be moveable or immoveable: (I.L.R., 32 B., 59). He is not bound to *set aside* the alienation while suing for recovery of possession from the alienee: (33 C., 257). Accordingly, if there be more reversioners than one, each of them can maintain a suit for his share only, and is not bound to sue for recovery of the whole estate: (13 W.N., 201). It is not necessary for the reversioner to plead absence of legal necessity, it being incumbent on the alienee to prove legal necessity for establishing his title to the property alienated by a widow: (25 I.A., 183, 191). Even when an alienation may be partially justifiable, or a portion of the consideration may be valid, the whole alienation must be set aside: (34 I.A., 72; 9 L.J., 453).

When an alienation by a widow cannot remain valid after her death, there being neither necessity, nor the next heir's consent, the purchaser cannot have any equity against the reversioner for money spent by him for erecting any building on, or making any improvement of, the land improperly alienated: I.L R., 32 B., 32.

It has already been said that when the sale is excessive, the reversioner may have the sale set aside on payment of the amount necessary to be raised: (*ante* p. 437). But it seems that the difference should be considerable, for justifying such a course.

Deceased widow's debts.—The actual reversioner succeeding to the possession of the estate after the death of the widow is bound to pay off the debts contracted by the widow for a valid purpose for which she might have alienated any portion of the estate, although the debts were not charged upon the estate. It was so held by the Calcutta High Court in the case of *Ramcoomar Mitter* (I.L.R., 6 C., 36) in which a widow had borrowed money for the purpose of defraying the marriage expenses of the daughter of a son who had pre-deceased his father, and died without repaying the debt. But the Allahabad High Court dissents from this view: I.L.R., 19 A., 300.

In a recent case, it has been held by the Judicial Committee

to be a general principle of Hindu law that he who takes an estate becomes liable for the debts of the estate; the reversioner is liable for debts which the widow was justified in incurring, especially when but for the debt the estate would have been lost to him: *Munshi Karim* v. *Kunwar Gobind*, 13 W.N., 1117.

In the case of *Hurrymohun Roy* (I.L,R., 10 C., 823) it has also been laid down by a Full Bench of the Calcutta High Court that if a female heir, who represents the entire estate, enters into a contract with a tradesman, which has conferred a benefit upon the estate, and is such as a prudent owner would make for the preservation of the estate, the obligation arising out of it will be annexed to the estate in the hands of the reversioner, if she dies before discharging the same. The facts of the case were as follows;—A daughter inheriting a large estate belonging to her father, ordered a quantity of lime for the purpose of making repairs to certain houses on the estate; the repairs were completed, but she died without paying the price of the lime supplied on credit. The lime-merchant was declared entitled to recover from the estate in possession of the reversionery heir.

It should be borne in mind that the widow takes the estate as the surviving half of her husband, her life is deemed as the continuation of her husband's life, for the purpose of ascertaining the reversionary heir. The estate is fully vested in her in the same way as if the husband lived in her, the only distinction being that her power of alienation and of charging the estate for debts is qualified. If the debts contracted by her are lawful, then the same consequences should follow as if the same were the husband's debts, that is to say, the debts should be a charge on the estate in the hands of the reversioner who must be deemed to be the heir of the widow representing the husband, and as such, liable to pay her lawful debts. The reversioner cannot succeed in most cases except upon the theory that the husband lives in the widow, and dies when she dies. It appears to be perfectly reasonable and equitable that his liability should be determined by the same theory which forms the foundation of his right, he being entitled to the residue left after meeting the widow's lawful expenses. When the reversioner is entitled to the rents and profits that accrued and became due to, but were unrealized by, the widow, then on the same principle he should be held liable to pay the debts which could be realized from the estate, were the widow alive.

Accordingly, it has been held by a Full Bench of the Bombay High Court presided by the Chief Justice Sir L. Jenkins that debts properly incurred by a Hindu widow for purposes of the business of a trade to which she as heiress of her husband succeeded, are recoverable after her death from the assets of the business as against the reversioners, even in the absence of a specific charge: *Sakrabhai* v. *Magan Lal*, I.L.R., 26 B., 206.

But the restrictions on the widow's power of alienation are not relaxed in reference to an ancestral family business devolved on her; necessity for alienation to pay the debts of the business, must be proved by the alienee: *Sham* v. *Achhan*, 25 I.A., 183.

CHAPTER XIII.

SUCCESSION TO STRIDHANA.

ORIGINAL TEXTS.

१ । ऋक्थं मृतायाः कन्याया गृह्णीयुः सोदराः स्वयं ।

तदभावे भवेन्-मातु-स्तदभावे भवेत् पितुः ॥ बौधायनः ॥

1. The wealth of a deceased maiden, let the uterine brothers themselves take; on failure of them, it shall belong to the mother; in her default, it shall belong to the father. Baudháyana, cited in Mit. 2, 11, 30 and in D. B., 4, 3, 7.

२ । दत्त्वा कन्यां हरन् दण्ड्यो व्ययं दद्याच्च सोदयं ।

मृतायां दत्तम् आदद्यात् परिशोध्योभय-व्ययं ॥ याज्ञवल्क्यः ॥

2. For detaining a maiden after betrothing her, the offender shall be punished, and shall also make good the expenditure (incurred by the bridegroom's side) together with interest; if she die (after troth plighted) let the bridegroom take back the gifts he had presented, meeting however the expenditure on both sides.—Yájnavalkya.

३ । जनन्यां संस्थितायान्तु समं सर्व्वे सहोदराः ।

भजेरन् मातृकं ऋक्थं भगिन्यश्च सनाभयः ॥

मातुश्च यौतुकं यत् स्यात् कुमारीभाग एव सः ।

स्त्रियास्तु यद्-भवेद्-वित्तं पित्रा दत्तं कथञ्चन ।

ब्राह्मणी तद् हरेत् कन्या तदपत्यस्य वा भवेत् ॥

ब्राह्म-दैवार्ष-गान्धर्व्व-प्राजापत्येषु यद्-धनं ।

अप्रजायाम् अतीतायां भर्त्तुरेव तद् इष्यते ॥

यत् त्वस्याः स्याद् धनं दत्तं विवाहेष्वासुरादिषु ।

अतीतायाम् अप्रजायां मातापित्रोस्तदिष्यते ॥ मनुः ॥

3. When the mother is dead, let all the uterine brothers and uterine sisters equally divide the maternal estate. But whatever property is the mother's *Yatuka* (gift at the time of marriage), that is the share only of her maiden daughter. The wealth of a woman, which has been in any manner given to her by her father, let the *Brahmani* daughter take; or let it belong to her offspring. It is admitted, that the property of a woman (married) in the forms called *Bráhma, Daiva, A'rsha, Gándharva, and Prájápatya,* shall go to her husband, if she die without issue. But the wealth given to a woman (married) in the forms of marriage called, *A'sura* and the like (i. e, *Rákshasa* and *Paisácha*) is ordained, on her death without issue, to become the property of her mother and father, —Manu.

४ । मातु-र्दुहितरः, शेषम् ऋणात्, ताभ्यऋतेऽन्वयः ।

अप्रज-स्त्रीधनं भर्त्तु-र्ब्राह्मादिषु चतुर्ष्वपि ।

दुहितॄणां, प्रसूता चेत्, शेषेषु-पितृगामि तत् ॥ याज्ञवल्क्यः ॥

4. The daughters share the residue of their mother's property after payment of her debts; in their default the (male) issue. The property of a childless woman (married) in the four forms beginning with the *Bráhma*, belongs to her husband; but if she leaves progeny, it belongs to daughters: and in other forms of marriage, it goes to her parents (on failure of her issue).—Yájnavalkya.

५ । समं सर्व्वे सोदर्य्या द्रव्यम् अर्हन्ति कुमार्य्यश्च ॥ शङ्खलिखितौ ॥

5. All the uterine brothers and maiden sisters are equally entitled to the property.—Sankha and Likhita.

६ । सामान्यं पुत्र-कन्यानां मृतायां स्त्रीधनं स्त्रियां ।

अप्रजायां हरेद्-भर्त्ता माता भ्राता पितापि वा ॥ देवलः ॥

6. A woman's property is common to her sons and daughters, when she is dead; but if she leaves no issue, her husband shall take it, or her mother, brother or father.—Devala.

७ । मातु र्दुहितरोऽभावे दुहितॄणां तदन्वयः ॥ नारदः ॥

7. Daughters take their mother's property; on failure of daughters, their (or her) issue.—Nárada.

८ । स्त्रीधनं दुहितॄणाम् अप्रत्तानाम् अप्रतिष्ठितानाञ्च ॥ गौतमः ॥

8. A woman's property belongs to her daughters, unmarried, and unprovided.—Gautama.

९ । पितृभ्याञ्चैव यद् दत्तं दुहितुः स्थावरं धनं ।
अप्रजायाम् अतीतायां भ्रातृगामि तु सर्व्वदा ॥ वृद्धकात्यायनः ॥

9. But whatever immoveable property is given by the parents to their daughter, goes to her brother, on her dying without leaving issue.—Senior Kátyáyana.

१० । बन्धुदत्तन्तु बन्धूनाम्, अभावे भर्त्तृगामि तत् ॥ कात्यायनः ॥

10 But what is given by her kindred, belongs to her kindred; in their default, it goes to her husband.—Kátyáyana.

११ । स्त्रीधनं तदपत्यानां दुहिता च तदंशिनी ।
अप्रत्ता चेत्, समूढ़ा तु न लभेत् मातृकं धनं ॥ वृहस्पतिः ॥

11. A woman's property belongs to her children; and the daughter is a sharer of it; but if there be an unmarried daughter, the married daughter does not get the maternal property.—Vrihaspati.

१२ । मातुः स्वसा मातुलानी पितृव्य-स्त्री पितृस्वसा ।
श्वश्रुः पूर्व्वज-पत्नी च मातृतुल्याः प्रकीर्त्तिताः ॥
यदासाम् औरसो न स्यात् सुतो दौहित्र एव वा ।
तत् सुतो वा, धनं तासां स्वस्त्रीयाद्याः समाप्नुयुः ॥ वृहस्पतिः ॥

12. The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced equal to the mother: if they leave no issue of the body, nor son, nor daughter's son, nor their son, the sister's son and the like shall take their property.—Vrihaspati.

The term "the sister's son and the like" in this text means the male correlations of the six female relations declared equal to the mother, namely, her own sister's son, her husband's sister's son, her husband's brother's son, her own brother's son, her son-in-law and her husband's younger brother, respectively.

१३ । सर्व्वासाम् एक-पत्नीनाम् एका चेत् पुत्रिणी भवेत् ।
सर्व्वास्ता तेन पुत्रेण पुत्रिण्यो-मनुरब्रवीत् ॥ मनुः ॥

13. If among all the wives of the same man, one becomes mother of a son, Manu says that by that son all of them become mothers of male issue.—Manu.

SUCCESSION TO STRIDHANA.

Husband's gift to wife.—Gift of property by a Hindu husband to his wife is not deemed to create such an absolute right of the wife over it during the husband's life-time, as to entitle her to dispose of it according to her pleasure, (D.B., 4, 1, 8);

and it is doubtful whether such property would go to her heir if she dies during the husband's life, having regard to the peculiar relation between them, and to the difficulty of ascertaining whether any moveable property was intended to be absolutely given to her by the husband. It has been held by a division Bench of the Bombay High Court presided by Chief Justice Sir Lawrence Jenkins that except in the case of *saudáyika*, a woman's power of alienation over her *strídhana* is subject to the control of her husband during coverture, and without his consent she cannot bequeath by Will when the husband survives: *Bhau* v. *Raghunath*, I.L.R., 30 B., 329.

Husband's gift of immoveable property.—It has already been seen that according to Hindu law, the wife takes only a life-estate in the immoveable property given by the husband, and she has no power of absolute alienation over it, whether it be a gift *inter vivos* or a bequest, (I.L.R., 5 C., 684); and it appears to pass to the husband's heirs after her death. The Hindu law raises a conclusive presumption against the gift, by a husband to his wife, of a higher than life-interest in immoveable property. The term दान=*dána* or gift is thus defined by Hindu lawyers, —स्वस्वत्वनिवृत्तिपूर्व्वक-परस्वत्वापत्तिफलको दानपदार्थः—"The meaning of the term *dána* or donation is, that it is that, of which the effect is, the generation of another person's proprietary right, after the extinction of the donor's own proprietary right." Hence the words "I give the property to you" are sufficient according to Hindu law, to pass to the donee whatever interest the donor has in the property at the time; and the addition of any other words expressing that the gift is intended to be absolute is superfluous and unnecessary. Hence the position that if there are words in the deed of gift, showing the intention of granting an absolute estate to the wife, then she is entitled to such estate,—is contrary to the rule of Hindu law.

The principle upon which this rule of Hindu law is founded appears to be similar to that which underlies the Restraint on Anticipation in English law, the present case being the converse of that instance in English law. There is no reason why a Hindu husband should give immoveable property to the wife in such a manner that the same may ultimately go to her parents or their relations. A Hindu husband feels himself bound to make such provision for the wife as will enable her to get maintenance for her life, or so long as she retains the character of being his wife or widowed wife. If a Hindu husband is found to execute a deed of gift purporting to make an absolute gift

of immoveable property to his wife, it must be presumed to have been made to purchase peace, that is to say, the making of the deed was caused by such inportunity of the wife as took away the free agency of the donor, or it must be presumed that the husband was weak-minded and the wife was of a commanding disposition and acquired great ascendancy over the husband, so as to exercise undue influence to such an extent as to compel him to execute the deed according to her wishes. In every such case the husband is found to be a mere puppet in the hands of his wife who is in the majority of instances considerably younger than the husband. His conduct in this respect is often most unnatural and unreasonable in the estimation of Hindu Society. Hence Hindu law says that a Hindu husband's gift of immoveable property to his wife can never be operative and effectual after her death.

The principle underlying this rule of Hindu law must be either that the husband is incompetent to make an absolute gift of immoveable property to his wife, or that the wife is incompetent to acquire an absolute title in the husband's immoveable property, in whatever way it may come to her hands, *i.e.*, whether by gift, inheritance or partition. The latter appears to be the right principle, as it has been held to apply to inheritance and also to the share allotted to her on partition.

This rule of Hindu law makes it incumbent on the Courts construing such a deed of gift, to start with a *presumption* against the grant by a husband to his wife, of more than a life-interest in immoveable property.

It has, however, been held that a Hindu husband is not legally incompetent to make an absolute gift of immoveable property to his wife. Hence it is held that this rule of Hindu law does not apply when the deed of gift shows a clear intention of giving an absolute estate ; it is also held not necessary that there should be such words as are ordinarily used to pass an absolute estate : the intention is a matter of construction and may be expressed in other ways : I.L.R., 9 C., 830 ; 11 B., 573 ; 27 C., 44 and 649 ; 19 A., 133. In case her interest be absolute, the property will pass to her heirs.

But the view expressed by Chief Justice Farran of the Bombay High Court in the following passage, appears to be what is consistent with the original principle of Hindu law, namely,— "His wife is *to take possession and enjoy* the property, but he adds to this no words of inheritance, nor does he directly give her any power of disposition over it. The courts have always

leaned against such a construction of the will of a Hindu testator as would give to his widow unqualified control over his property. By the use of such expression as, 'my wife is the owner after me,' or 'my wife is the heir,' it is usually understood that the testator is providing for the succession during the life-time of the widow and not altering the line of inheritance after her death": *Harilal* v. *Bai*, I.L.R., 21 B., 376, 380 ; see also I.L.R., 22 M., 357 and 431.

Sometimes the document embodying the disposition in favour of the wife, is found to be drawn up by the wife's relations, and executed by the man while lying on his death-bed in his father-in-law's house in the absence of his own relations.

This rule of Hindu law appears to be an exception to the rule of construction embodied in Section 82 of the Succession Act, and in Section 8 of the Transfer of Property Act, namely, that in the absence of *express* reservation, the entire interest of the testator or transferor will pass respectively to the legatee or transferee.

A maiden's property—goes in the following order, as provided in Baudháyana's text (No. 1, *supra* p. 455), according to both the Mitákshará and the Dáyabhága :—

(1) Full brother, (2) mother, and (3) father.

In default of them, the nearest relations of the parents take according to the Mitákshará school : the Víramitrodaya cites Baudháyana's text, and then adds—"On failure of the mother and the father, it goes to *their nearest relations.*" It seems that a maiden's *status* is similar to that of a woman married in a *disapproved* form of marriage, both being under the *patria potestas* of their father. The term "*their nearest relations*," must be the father's relations, in the first instance, inasmuch as they are also the mother's relations, so the term is not to be taken distributively ; and in default of such relations, the relations of the mother alone become heirs. Accordingly it has been held by the Bombay High Court, that the maiden's father's mother's sister is to be preferred to her maternal grandfather. It should be noticed that nearness or propinquity is the principle, on which the order of succession is worked out in the Mitákshará, hence the relations are to take a woman's property in the same order in which they would become heirs to her husband, or father, or mother : *Janglubai* v. *Jetha*, 32 B., 409 ; see cases cited at p. 461 *infra*.

In the Bengal school the parental relations must take a maiden's property in the same order in which they inherit a

married woman's non-*jautaka* property, in default of the issue of her body, and of her brother and parents.

Property given to a damsel by an intending bridegroom must be returned to him, on her death before marriage.

A married woman's property according to the Mitakshara—passes in the following order :—

(1) Maiden daughter, (2) married but unprovided or indigent daughter, (*Uma* v. *Gokool*, 5 I.A., 40 = I.L.R., 3 C., 587), there must be marked difference in wealth, in order to give preference to the poorer daughter, (I.L.R., 23 B., 229), (3) married provided daughter, (4) daughter's daughter (5) daughter's son, (6) son (including adopted son,) (7) son's son (including son's adopted son), (8) husband and his heirs in the same order in which they take his property, if the marriage took place in the approved forms; but if the marriage took place in any of the disapproved forms, then instead of the husband and his heirs, the mother, the father, the father's heirs, and in their default the mother's relations, take.

Accordingly, when the marriage of a woman was in an approved form, her estate goes to her husband in preference to a stepson (I.L.R., 33 B., 452); to her co-widow, in preference to her husband's brother or nephew or first cousin's son, (*Bai* v. *Hunsraj*, 33 I.A., 176 = I.L.R., 30 B., 431 ; 30 B., 333); to her husband's full brother in preference to his half brother (30 B., 607); and to her husband's sister's son, in preference to her own sister's son (28 A., 345): that is to say, it descends in the same way as if it had belonged to the husband himself.

But if the marriage of a woman was in a disapproved form, her estate would devolve as if it had belonged to her father; and accordingly her sister succeeds in preference to a sister's son, (I.L.R., 29 M., 358 ; 33 B., 433); and her father's mother's sister, in preference to her mother's parents (32 B., 409).

As regards the succession of the issue of a woman's body, it is worthy of notice that according to the Mitákshará the female issue is preferred to the male issue who however succeed to the father's estate to the exclusion of the female issue: thus the offspring of the same sex with the parent are preferred for the purposes of inheritance. But the Dáyabhága recognises the preference of daughters only, and that too is limited to *yautuka* or nuptial gifts only, as is set forth below.

It should be observed that generally marriages now take place in the approved form called *Bráhma* among the superior castes. But even among some sections of the higher castes,

and among the lower orders who form the majority of the Hindus, the *Asura* form prevails. It has, however, been held that under the law of the Benares School, marriage must be presumed to have taken place in one of the approved forms: I.L.R., 25 C., 354.

You will note how completely a Hindu female becomes identified with her husband's family; her own relations are excluded by those of her husband, just as she is excluded by her father's relations living jointly with him.

The above text (No. 12) of Vrihaspati, enumerating the sister's son and the like as heirs to *Strídhana,* is not cited in the Mitákshará; but it is cited in the Víramitrodaya and the Viváda-Ratnákara, and these commentaries appear to lay down that these six relations are to take before the relations included under the general rules, that is, before the husband's heirs in case of approved forms of marriage of the deceased woman, and before the parents' heirs other than the brother in the disapproved forms of marriage, respectively.

The authority of this text has been recognised in Mithilá cases, (*Mohun* v. *Kishen,* I.L.R., 21 C., 344,) and also in a case governed by the Benares School: *Ranjit* v. *Jagannath,* I.L.R., 12 C., 375.

It would seem that the rival wife's son and daughter should come in before these six relations, for the same season.

The order of succession among the six relations in the cases of approved marriage, appears to be as follows:—(1) the husband's younger brother, (2) the husband's brother's son, (3) the husband's sister's son, (4) her own brother's son, (5) her own sister's son, (6) and the son-in-law: *Bachha* v. *Jugmon,* I.L.R., 12 C., 348.

The Judicial Committee have held that the Víramitrodaya is *declaratory* of the law of the Benares school, (12 M.I.A., 448.) But the Calcutta High Court have held that that treatise cannot be referred to when the Mitákshará is clear, and that as the Mitákshará gives completely and exhaustively the order of succession to *Strídhan* property, no effect can be given to the text of Vrihaspati, and to what is laid down in the Víramitrodaya on the strength of that text: *Jagannath* v. *Ranjit,* I.L.R., 25 C., 354.

The Sulka or bride's price,—however, goes to a woman's uterine brother in preference to her own issue; but if there be the mother, she is to be preferred to the brother: Mit. ii, xi, 14. The reason is that originally it belonged to the parents; but later on, it was declared to become the bride's *Strídhan;* and

this rule of succession appears to be a compromise between the original and the later views.

Mitakshara and Dayabhaga.—The Mitákshará rule of succession to Strídhanam, whereby in default of the issue of her body, a woman's property goes when her marriage was of an approved description, to her husband and his relations, to the total exclusion of her own relations, including her parents, brother and other dear and near ones ; and when her marriage was of a disapproved description, to her own relations, to the total exclusion of her husband and his relations,—is an archaic one founded on the facts that the ancient system of succession was confined to the family moulded on the principle of *patria potestas*, and that marriage with or without transfer of the same over the daughter, determined her status of becoming a member of her husband's family in the first case, or of continuing a member of her father's family in the latter. Very strong though the family tie or agnatic relation has all along been in India, it became in the course of time affected by the claim of the natural nearness and dearness of a few cognate relations, and accordingly has arisen the distinction between the Mitákshará and the Dáyabhága with respect to succession. The change of law made by the founder of the Bengal School consists in the re-adjustment of the order of succession which was originally confined to the family, by the recognition of consanguinity to some extent, in addition to the agnatic relationship.

Dayabhaga rules—on the subject are not so simple as those of the Mitákshará. The author divides *Strídhan* property into two classes, namely, *yautuka* and *ayautuka* or non-*yautuka*; the latter includes property received previously or subsequently to marriage.

Distant succession to both the above descriptions of *Strídhan* is the same. The courses of descent in the earlier stage are different.

There is a doubt about the authenticity of a particular passage of the Dáyabhága (4, 3, 33,) which affects the position of the rival wife's son, daughter and grandson; there is also difference between the works of authority in Bengal, and there is besides difficulty as to the construction of certain passages ; so the following orders of succession should be taken as provisional only being not settled yet in some respects.

The doubt as to the authenticity of the said passage of the Dáyabhága (iv, iii, 33) has now been removed by Justice Mookerjee who has held, and if I may presume to say so, very

rightly held that passage to be spurious and an interpolation," (*Purna* v. *Gopal,* 8 L. J., 369, 428); and so the rival wife's progeny must now occupy their proper place in the order of succession, as is suggested below with some hesitation.

Succession to yautuka, is in the following order :—

(1) Maiden daughter, (2) betrothed daughter, (3) married daughter,—1st, one having or likely to have a son, 2nd, one that is not so,—(4) son (including adopted son), (5) daughter's son, (6) son's son, (7) sons grandson, (8) husband, (9) brother, (10) mother, (11) father, (12) rival wife's son, daughter, son's son and daughter's son.

Succession to ayautuka, (other than father's gifts) :—

(1) Son and maiden daughter, (2) married daughters having or likely to have sons, (3) son's son, (4) daughter's son, (5) barren and childless widowed daughters, (6) son's grandson, (7) whole-brother, [half-brother,] (8) mother, (9) father, (10) husband, (11) rival wife's son, daughter, son's son and daughter's son.

The half-brother's true position in the order, is not free from doubt and difficulty.

Succession to all classes of Stridhan after the above relations, is in the following order :—

(1) Husband's younger brother, (2) husband's brother's son, (3) sister's son, (4) husband's sister's son, (5) brother's son, (6) son-in-law, (7) husband's *sapindas* &c., (8) father's kinsmen.

It has already been said that words importing relations include those of the half blood; accordingly it has been held that a woman's half sister's son takes in preference to her husband's elder brother. *Dasharathi* v. *Bepin,* I.L.R., 32 C., 261. But see. *contra* 4 W.N., 743.

It should be observed that as regards non-*yautuka* property the husband is postponed to the woman's parents and brothers, according to the Dáyabhága, so that property given by the husband's relations, will go to her parents and brother, in preference to the husband : *Judoo* v. *Bussunt,* 19 W.R., 264; *Hurrymohun* v, *Shonatun,* I.L.R., 1 C., 275.

The Bengal authorities are in conflict with each other with reference to succession to *Stridhan.*

Father's gifts other than nuptial presents—were stated in previous editions of this work to descend in the same way as *Yautuka,* on the authority of Srikrishna's Synopsis of heirs to *Stridhan* given at the end of his commentary on the 4th Chapter of the Dáyabhága, as well as of his Dáyakrama-

Sangraha. This view of Srikrishna's is founded on the first interpretation put by Jímútaváhana on Manu's text (3rd Sloka of Text No. 3) in the Dáyabhága, Ch. 4, Sect. 2, para. 16, according to which the daughter, and not the son, is entitled to succeed first, to a father's gift whenever made, in the same manner as to *Yautuka*. Srikrishna appears to apply to this kind of *Strídhan* the entire order of succession applicable to *Yautuka* or nuptial presents. It is extremely to be regretted that the attention of the Court was not invited to these authorities in the case of *Gopalchandra Pal* v. *Ramchandra Pramanik*, I.L.R., 28 C., 311, in which therefore the order given above is dissented from, as being based on no authority, and the brother is held preferential heir to the husband. It may be that the result would have been the same, but still the doubt would have been set at rest.

It is worthy of remark that Jímútavahana himself condemns the said first interpretation of Manu's text on the ground that the word Bráhmaní in the text would be ignored in that interpretation; and accordingly he puts on that text another interpretation according to which the text applies when a man's wife of an inferior caste dies without any issue of her body, leaving a step-daughter of a Bráhmaní co-wife. Thus it is shown by the author of the Dáyabhága that there is nothing in this text to support a separate rule of succession applying to the father's gifts in ordinary cases, different from the two rules already laid down by him.

In the recent case of *Ramgopal* v. *Narain Chandra*, (I.L.R., 33 C., 315 = 3 L.J., 19), the question arose as to whether the husband or the mother was entitled to succeed to an immoveable property *given* by the father in the form of a mokarari maurusi lease reserving a quit rent; it was undoubtedly a *gift* by the father of all his interests *minus* the rent. Upon a consideration of all the conflicting authorities, the mother was held preferable to the husband. Justice Mukharji has endeavoured to reconcile the conflict between Jímúta and Srikrishna. The conflict, however, seems to be irreconcilable: see Dáyakrama-Sangraha, 2, 4, 11. But it must be admitted that the question is beset with considerable difficulty arising from apparent contradictions

In a recent case (*Prosanno* v. *Sarat*, 36 C., 86) a son has been held to be entitled, in preference to a married daughter, to inherit their mother's non-*jautuka gift* by her father.

Joint family system and succession to Stridhan.—The

of succession to *Stridhan* property, in some respects, may seem to be arbitary, uunatural and inexplicable unless we take into consideration, the joint family system, which is the real key to many rules of Hindu law, and the nature of a woman's connection with the different members thereof, and with her own relations. If not after marriage, after the *Dwiragamana* ceremony, a woman does seldom, if ever, go to her father's house; her brother, father, brother's son, and sister's son may come to her father-in-law's house to see her : but their visits are few and far between. Seldom if ever do sisters meet each other. As regards her husband's relations, she does not appear before, nor speak with, her father-in-law or his brother or her husband's elder brother or cousin, or any other male relation of higher degree or rank. She appears before, and speaks with, the husband's younger brothers and cousins, his nephews and other relations of inferior rank ; and with these she comes into contact continuously. The husband's younger brother is called in Sanskrit, *devara*, meaning a *playmate* ; in fact, a woman is very intimate with him, to whom she may speak in the presence of all female relations and males of inferior rank, and from whom she gets great help ; inasmuch as she cannot speak to her husband in the presence of any male or female relation of higher rank. This is the usage in most places and among most castes.

We may now understand why the husband's younger brother and the husbands brother's sons are preferred to her own nephews, and why the father-in-law and the husband's elder brother are placed lower in the order of succession.

There is very little distinction between the husband's younger brother of the whole-blood and one of half-blood, as regards a woman's connection with them in a joint family ; their equality appears from the rule in the Dáyabhága that both kinds of brothers jointly succeed to undivided immoveable property of a deceased brother if succession opens to the brothers although it is not followed by the Calcutta High Court.

In a case of competition between t[illegible] the husband's uterine brother is entitled to preference : in his default the husband's half-brother is entitled to inherit a woman's *Stridhan* in the same circumstances, in which the husband's full-brother would have succeeded, had he been in existence. There is no valid reason for restricting the term—"the husband's younger brother," as used in the Dáyabhága, Ch. IV, Sect. iii, paras. 36 [3]7, to the husband's *full* brother. But it appears to be so

restricted in a case in which it has been held that a woman's brother's son is entitled to succeed in preference to her husband's younger brother of the half-blood : 4 W.N., 743. This view is, however, contrary to the Dáyabhága and other commentaries of the Bengal school.

The husband's male issue by another wife is treated by a childless woman as if sprung from her own body ; he addresses her as mother, and the mutual attachment is oftener than not, very strong.

The faculty of feeling is stronger in women than in men ; and a woman retains her affection for her parents and other relations though they are out of sight. When a daughter leaves her father's house and lives with her husband in her father-in-law's house, it is the mother who anxiously enquires about and looks after her ; and the son-in-law also is an object of her love and affection, so as to be recognized as her heir in certain circumstances stated above.

Mithila, Maharashtra and Dravira Schools.—With respect to succession to Strídhana property, the rule laid down in the Mitákshará is not followed in its entirety by these schools. Having regard to the conflicting texts of the sages, they limit the daughter's preferential right to certain descriptions of woman's property, such as the *jautuka* ; and as regards the rest, they maintain the joint succession of the son and the maiden daughter. The details are not given here ; but it should be mentioned that these schools do not agree in all respects, nor do they lay down the order of succession in a complete and exhaustive manner.

As regards the Maháráshtra School, it should be noticed that, except in those districts where the authority of the Mayúkha is followed, the Mitákshará rule prevails.

Woman of the Town.—Should a female become degraded by becoming a woman of the town, then according to Calcutta High Court, her connection with her undegraded relations ceases, so that the latter cannot be her heirs ; I.L.R., 21 C., 697. But the Madras High Court have held that prostitution does not sever her legal relation, and the consequent degradation does not entail a cessation of the tie of kindred, and that therefore such a woman's stepson is entitled to inherit her property (I.L.R., 23 M., 171). The same view has been adopted by Allahabad High Court : 29 A., 4.

But degradation appears to operate as civil death in cases of unchastity, but not in all ; see p. 368 *supra*.

It has been held that a Hindu woman does not cease to be a Hindu by reason of her degradation on becoming a woman of the town; and succession to her property is governed by Hindu law: I.L.R., 25 C., 254. There is a difference of opinion as to the effect of this decision, (6 L.J., 372; 10 W.N., 1085); and there is a conflict between the earlier and the later decisions; and accordingly, the question was referred to a Full Bench of the Calcutta High Court, but was not decided inasmuch as a fact upon which the question arose was not, and could not be, found for want of evidence, and the Full Bench refused to assume that fact for the purpose of deciding it: *Chatoo* v. *Rajaram*, 11 L. J., 124. It is very difficult to say what relations would be heirs to these fallen women; for, while the Madras High Court held that a degraded sister was entitled to inherit the property of a prostitute (I.L.R, 12 M., 277) the Calcutta High Court held in the above case, that she is not entitled. If the tie of kindred be not severed by reason of the unchastity not being so heinous as to cause civil death, her undegraded heirs would succeed. But should it be of such a character as to operate as civil death and to make her an outcaste, then it is difficult to say who would be her heir.

It should be observed that relationship is the foundation of heirship; it has been held by the Bombay High Court and recently by the Madras and Allahabad High Courts that female relations are entitled to become heirs to a male's estate in preference to strangers such as a pupil, notwithstanding the general rule excluding women from inheritance: see *supra* pp. 296 and 298.

CHAPTER XIV.

HOLY ORDERS AND ENDOWMENT.

ORIGINAL TEXTS.

१। श्री-सदाशिव उवाच,—

चत्वारः कथिता वर्णाः आश्रमा अपि सुव्रते ।
आचारश्चापि वर्णानाम् आश्रमाणां पृथक् पृथक् ॥
कृतादौ, कलिकाले तु वर्णाः पञ्च प्रकीर्त्तिताः ।
ब्राह्मणः क्षत्रियो वैश्यः शूद्रः सामान्य एव च ॥

एतेषां सर्व्ववर्णानाम् आश्रमौ द्वौ महेश्वरि ।
ब्रह्मचर्य्याश्रमो नास्ति वानप्रस्थोऽपि न प्रिये ।
गार्हस्थ्यो भिक्षुकश्चैव आश्रमौ द्वौ कलौ युगे ॥
भैक्षुकेऽप्याश्रमे देवि वेदोक्तं दण्डधारणं ।
कलौ नास्त्येव तत्त्वज्ञे यतस्तत् श्रौतसंस्कृतिः ॥
शैवसंस्कारविधिनाऽवधूताश्रमधारणं ।
तदेव कथितं भद्रे सन्न्यासग्रहणं कलौ ॥
विप्राणाम् इतरेषाञ्च वर्णानां प्रबले कलौ ।
उभयत्राश्रमे देवि सर्व्वेषाम् अधिकारिता ॥
ब्राह्मणः क्षत्रियो वैश्यः शूद्रः सामान्य एव च ।
कुलावधूतसंस्कारे पञ्चानाम् अधिकारिता ॥

महानिर्व्वाणतन्त्रं । अष्टमोल्लासः ।

1. "The great ever-auspicious God said —

O virtuous Goddess! In the *satya* (golden) and the other (two) ages, the castes and also the orders of life are declared to be four; and the usages also of the (four) castes, and of the (four) orders of life are separately declared for each. But in the Kali age, the castes are declared to be five, namely, the Bráhmana, the Kshatriya, the Vaisya, the Sudra, and the general body of human beings (other than these four) O great Goddess! of *all* these (five) castes, the orders of life are two; for, O dear Goddess! the order of life called Brahmacharjya or studentship, and the order of life called Vána-prastha or hermitage (the first and the third of the four orders), do not now exist; (but) the two orders of life, namely, the Gárhasthya or the order of the householder, and the Bhikshuka or the order of the ascetic or religious mendicant, only, exist in the Kali age. O wise Goddess! the holding of a staff, declared in the Vedas, by the order of the Bhikshu or ascetic, also, does not exist in the Kali age, because that is prescribed for the order of ascetics initiated according to the Vedas. O auspicious Goddess! the adoption of the order of Avadhútas or ascetics according to the rules of initiation prescribed by the God Siva (in the Tantras), is alone declared to be the adoption of Sannyása (Renunciation or asceticism) in the Kali age. O Goddess! in the advanced state of the Kali age, the Bráhmanas and the other (four) castes are *all* entitled to these two orders of life. The Bráhmana, the Kshatriya, the Vaisya, the Sudra, and the general body of human beings, these five are entitled to be initiated as Sannyásis or ascetics according to the Tántrik system."

The above slokas are not continuous, but are cited from different parts of the Mahá-Nirvana-Tantra, Chapter 8.

२ । विद्याविनयसम्पन्ने ब्राह्मणे गवि हस्तिनि ।
शुनि चैव श्वपाके च पण्डिताः समदर्शिनः ॥ गीता, ५।१८ ।

2. "Learned persons look equally on a Bráhmana endowed with learning and humility, on a cow, on an elephant, as well as on a dog and on a man of the lowest outcast class." For, God pervades them all equally.—Gítá, 5, 18.

३ । चिन्मयस्याद्वितीयस्य निष्कलस्याशरीरिणः ।
उपासकानां कार्य्यार्थं ब्रह्मणो रूपकल्पना ॥ रघुनन्दनधृतवचनं ।

3. It is for the benefit of the worshippers (or devotees) that there is manifestation in images (male and female forms), of the Supreme Being, which is bodiless, which has no attribute, which consists of pure spirit, and which is without a second (being *i.e.* God is the Only Being existing in reality, there is no other being in real existence excepting Him).
—Text cited by Raghunandana.

४ । सौवर्णी राजती वापि ताम्री रत्नमयी तथा ।
शैलदारुमयी वापि लौहशङ्खमयी तथा ।
रीतिका धातुयुक्ता च ताम्रकांस्यमयी तथा ।
शुभदारुमयी वापि देवतार्चा प्रशस्यते ॥ मत्स्यपुराणवचनम् ।

4. An image of a God is commended if made of gold, or made of silver, or made of copper or made of gem, or made of stone or of wood, or made of iron or conch-shell, or formed of brass or consisting of copper and bell-metal, or made of sacred (or sacrificial) wood.—Matsya-purána.

५ । एवं रत्नमयं कुर्य्यात् स्फाटिकं पार्थिवं तथा ।
शुभदारुमयं वापि यद् वा मनसि रोचते ॥ मत्स्यपुराणवचनम् ।

5. Thus should (a Lingam or Phallic Symbol) be made of precious stone, or of crystal, or of earth, or of auspicious wood, or of what is agreeable to (one's) mind.—Matsya-purána.

६ । कुड्ये लेख्ये च मे कश्चित् पटे कश्चिच्च मानवः ।
पूजयेत् यदि वा चक्रे मम तेजोऽंशसम्भवे ॥ वराहपुराणवचनम् ।

[illegible] Some persons worship my image painted in a wall; and some, in [illegible] and some (worship me as embodied) in the sphere (of stone called Sálagráma) sprung from a part of my might.—Baráha-Purána.

[illegible] अस्पृश्य-स्पर्शने तु बौधायनः—द्रव्यवत् कृतशौचानां देवता-[illegible] भूयः प्रतिष्ठापनम् इति ।

देवतार्च्चा देवता-प्रतिमा। तासाम् अस्पृश्यस्पृष्टानां प्रकृतिद्रव्यस्य ताम्रादेर्यथेयं शौचं कृत्वा पुनः प्रतिष्ठापनात् पूज्यत्वम् इत्यर्थः, इति रत्नाकरः ॥

आदित्यपुराणे—खण्डिते स्फुटिते दग्धे भ्रष्टे स्थानविवर्ज्जिते।
यागहीने पशुस्पृष्टे पतिते दुष्टभूमिषु।
अन्यमन्त्रार्च्चिते चैव पतितस्पर्शदूषिते।
दशस्वेतेषु नो चक्रुः सन्निधानं दिवौकसः ॥

रघुनन्दनस्य देवप्रतिष्ठातत्त्वम्।

7. Now, in (the case of) touching by what ought not to be touched, Baudháyana (says,: —

"Re-consecration (should be made) of the images of gods, the purification of which shall have been made, like that of the materials."

"Devatárchchá" means the image of a god; "of them" (*i.e.* of the images) touched by what ought not to be touched, the materials being touched, if the materials such as copper and the like be sufficiently purified and re-consecration be made, then the image would be fit for worship: this is the meaning according to the Ratnákara. (So) in the Adipurána (it is declared)—"(If the image) be (1) mutilated, (2) cracked or broken or burst, (3) burnt, (4) fallen down, (5) removed from its place, (6) without worship (or not worshipped), (7) touched by a beast, (8) fallen in defiled grounds, (9) worshipped by reciting hymns addressed to another God, (10) and defiled by the touch of an outcast—in these ten (images) the Gods do not make appearance (or do not become present)."

Raghunandana's Deva-Pratishtha-Tattvam, last paragraph.

८। अथ जीर्णोद्धारविधिः। भगवान् उवाच—
जीर्णोद्धारविधिं कृत्स्नं सङ्क्षेपात् कथयामि ते। * * *
यद्-द्रव्या यत्प्रमाणा च या मूर्त्तिश्चोद्धृता हरेः।
तद् द्रव्या तत्-प्रमाणा च सा मूर्त्ति-स्तत्र कारयेत्।
यत्प्रमाणं यदाकारं यन्मयं विष्णुम् उद्धरेत्।
तत्प्रमाणं तदाकारं तन्मयं तत्र विन्यसेत्।
द्वितीये वा तृतीये वा दिवसे स्थापयेद्धरिं ॥
अत ऊर्द्धं भवेद् दोषो-विधिनापि निवेशिते।
अनेनैव विधानेन लिङ्गादीश्च विसर्ज्जयेत्।
अन्यं प्रकल्पयेत् तत्र तत् प्रमाणम् उदाहृतं ॥—हयशीर्षे।

8. "Now (is stated) the prescribed mode of Renewal of Decayed

Images. Bhagaván says,—"I shall tell you briefly the whole ordinance for renewing decayed images * * *

"Whatever is the material, and whatever the size, of the image of Hari (or God the Protector), that is to be renewed; of the same material and of the same size, an image is to be caused to be made; of the same size, of the same form, (and) of the same material, should be (the new image) placed there; either on the second or on the third day (the image of) Hari should be established; if (it be) established after that, even in the prescribed mode, there would be blame (दोषः) or censure or sin; in this very mode the Linga or Phallic Symbol and the like (image) should be thrown away; (and) another should be established, of the same size (&c.) as already described.—Haya-Sírsha.

[Only two pages of a work called Haya-Sírsha evidently the Haya-shirsha-Pancharátra have been printed—not the whole book. There is nothing to show from whose manuscript copy these pages are taken.]

९। ईश्वर उवाच —

जीर्णादीनां च लिङ्गानाम् उद्धारं विधिना वदे। * * *

असुरैर्मुनिभिर्गोत्रैः तन्त्रविद्भिः प्रतिष्ठितम्।

जीर्णं वाप्यथ वा भग्नं विधिनापि न चालयेत्॥

अग्निपुराणे त्र्यधिकशततमाध्याये।

असुरैर्मुनिभिर्देवैः तत्त्वविद्भिः प्रतिष्ठितम्॥ इति पाठान्तरम्।

9. "God said,—

"I shall speak of the renewal in the prescribed mode of Lingas or Phallic Symbols decayed and the like &c. * * *

(A linga) established by Asuras, or by sages or by remote ancestors, or by those versed in the Tantras, should not be removed even in the prescribed form though decayed or even broken."

Agni-Puránam, Chapter 103, (Poona Edition of 1900 A D., p. 143).

[There is a different reading of a part of this sloka, noted in the foot-note of the Poona edition of this Purána as one of the Anandásrama series of sacred books: according to which instead of—"or by remote ancestors or by those versed in the Tantras"—the following should be substituted, namely,]

"Or by Gods or by those versed in the highest religious truths."

१०। अथ जीर्णोद्धारः। स च लिङ्गादौ दग्धे भग्ने चलिते वा कार्य्यः।
[illegible] प्रतिष्ठित-लिङ्गादौ भङ्गादि-दुष्टेऽपि न कार्य्यः। तत्र तु
[illegible] इति त्रिविक्रमः॥—निर्णयसिन्धुः।
[illegible] स च लिङ्गादौ भग्ने दग्धे वा कार्य्यः। अयं च
[illegible]लिङ्गादौ भङ्गादिदोषेऽपि न कार्य्यः। तत्र मन्त्राभि-
[illegible]ः।

10. "Now Renewal of Decayed (Images is considered); that is to be performed when a Linga and the like are burnt or broken, or removed (from its proper place). But this is not to be performed with respect to a Linga or the like which is established by a Siddha or one who has become successful in the highest religious practice, or which is Anádi *i.e.*, of which the commencement is not known, or which has no commencement. But there Mahábhisheka or the ceremony of great anointment should be performed:—this is said by Tri-vikrama."—Nirnaya-Sindhu of Kamalákara-Bhatta, Bombay Edition of 1900, p. 264.

The author of the Dharma-Sindhu says as above, in almost the same words.—See Bombay Edition of 1888, p. 234 of that work.

११ । तत् असुरादिप्रतिष्ठापिततद्-व्यक्तिविषयम् । न तु दैवात् तद् व्यक्तिनाशेन तत्स्थानस्थापितेदानीन्तनताद्दृशव्यक्तिविषयम् ।

लोहाद्यं छिन्नभिन्नाङ्गं सन्धाय स्थापयेत् पुनः ।

सुवर्णाद्यष्टलोहनिर्म्मितं लिङ्गं दैवात् भग्नं, स तदेव सज्जं कृत्वा पुनः स्थापयेत् इत्यर्थः । —इति प्रतिष्ठामयूखे नीलकण्ठः ।

11. In the Pratishthá-mayúkha the above text of Agni-Purána is cited, adopting the second reading, and it is explained to refer to the original image, not to an image, substituted in case of total loss of the original image by reason of theft, flood, burning and so forth: p. 29.

In this work the following text is cited at p. 27.

"A metallic image of which a limb is cut or disunited should be again established after putting (the parts) together."

And it is explained in the said work thus,—"The meaning is, if a Lingam made of the eight metals beginning with gold, be accidentally broken, the very same should be again consecrated after joining the parts together."

Pratishthá-Mayúkha of Nílakantha, the author of Vyavahára-Mayúkha a treatise on Positive Law respected in the Bombay School of Hindu Law.

१२ । (*a*) तपः परं कृतयुगे त्रेतायां ज्ञानम् उच्यते ।

द्वापरे यज्ञम् एवाहुर्दानम् एकं कलौ युगे ॥ मनुः १, १८६ ।

(*b*) तपो धर्म्मः कृतयुगे, ज्ञानं त्रेतायुगे स्मृतं ।

द्वापरे चाध्वराः प्रोक्ताः, कलौ दानं दया दमः ॥ वृहस्पतिवचनं ।

12 (*a*). In the Krita (first) age (the performance of) austerity; in the Treta, (divine) Knowledge; in *dvápara*, (the performance of) Sacrifice; and in the (present) Kali age, Charity alone, is declared to be the chief (*dharma* or virtue).—Manu, 1, 186

12 (*b*). Austerity is ordained the Dharma (or religious duty or act) in the Krita (or first or golden) age; (true) Knowledge, in the Treta (or second) age; and Sacrifices are pronounced (the Dharma) in the Dvápara (or third) age; and *Donation* or *Charity*, *Compassion* and *Self-control*, in the (present) Kali age.

१३। धर्म्मार्थ-काम-मोक्षाणाम् आरोग्यं साधनं मतं।
अतस्त्वारोग्यदानेन नरो भवति सर्व्वदः॥
आरोग्यशालां कुर्व्वीत महौषधि-परिच्छदां।
विदग्ध-वैद्य-संयुक्तां भृत्यावसथ-संयुतां॥ नन्दिपुराणवचनं।

13. Freedom from disease is the means of (attaining the ends of man, namely) Dharma or religious merit, wealth, (objects of) desire, and liberation (of the self or soul) from transmigration: hence a man by the gift of (the means of medical treatment of persons suffering from disease and so causing) freedom from disease becomes the giver of everything. He must establish a *hospital* furnished with valuable medicines and necessary utensils, placed under experienced physician, and having servants and rooms for shelter of the patients.

१४। शङ्करात् परमं नान्यत् अतस्तस्मै विकल्पयेत्।
यतीनामाश्रयं कृत्वा वापि पक्केष्टकामयं॥
व्याख्यामण्डपसंयुक्तम् आसनैर्विविधैर्युतं।
पुष्पोद्यानसमायुक्तं सोदकं शङ्करालयं॥
ग्रामं दीपेन्धनाद्यर्थं प्रेष्यानाञ्चैव वेतने।
कौपीनोपानहाद्यर्थम् आश्रये विनियोजयेत्॥ कालिकापुराणं।

14. There is none superior to the God Sankara: to Him therefore should dedicate the *house* of Sankara, constituting it the (place of) shelter of the *yatis* or religious mendicants; which is to be built of burnt bricks, possessed of a hall for exposition (of religious doctrines), furnished with different kinds of seats, having a flower-garden, and having reservoir of water. A village should be assigned for meeting the expenses of the place of shelter, such as lamps, fuel, salary of servants, small pieces of cloth worn by ascetics, sandals, and the like.

१५। कृत्वा मठं प्रयत्नेन शयनासनसंयुतं।
पुण्यकाले द्विजेभ्योऽथ यतिभ्यो वा निवेदयेत्॥ भगवतीपुराणे।

15. Having carefully built a Math (or house for ascetics and their disciples), furnished with rooms (or furniture) for sleeping and sitting, and, at an auspicious time, dedicate the same to the twice-born or the yatis (or religious mendicants and their pupils).—Bhagabatí-Puránam, by Hamádri.

[illegible]। देवायतनकर्त्ता च यतीनाम् आश्रयस्य च।
[illegible]प्रपाकारी च क्रीडन् याति दिवोत्तमं॥ अगस्त्यवचनं।

16. A person consecrating a temple, also one establishing an asylum for ascetics, also one consecrating an alms-house for distributing food at all times (to the poor), ascends to the highest region of heaven.

[जल-सत्र (Jala-Sattra) is a place where cool and pure drinking water is stored in the summer, for free distribution to all persons coming there to quench their thirst.]

१७। कुर्य्यात् प्रतिश्रयगृहं पथिकानां हितावहं।
निजगेहैकदेशे वा साधून् पान्थान् निवासयेत्॥
अक्षयं पुण्यमुद्दिष्टं तस्य स्वर्गापवर्गदं।
सर्व्वकामसमृद्धोऽसौ देववत् दिवि मोदते॥ मार्कण्डेयपुराणं।

17. Should make a house of shelter for the benefit of travellers; or should lodge pious men (or ascetics) and travellers, in a quarter of one's own dwelling house: inexhaustible is declared his religious merit which secures (for him) heaven and liberation; abounding in all objects of desire, he enjoys happiness in heaven like a God.

१८। त्रिभौमं वा द्विभौमं वा कुर्य्याद्यैकभूमिकं।
मठं विचित्रशालाढ्यं विराजन्मत्तवारणं॥
ध्यानाध्ययनहोमादिव्याख्यानस्थान भूषितं।
सुधया वा शिलाभिर्वा सममाक्लिप्तभूमिकं॥
विन्यस्त-पुस्तकाधारभूत-नूतनसङ्कुकं।
नानाफलाकुलोद्यानराजिमण्डलमण्डितं॥
निर्म्मलस्वादुपानीयसुसम्भृतजलाश्रयं।
यतीनां पथिकानाञ्च निवासमुपसेदुषां॥
पादुकोपानच्छत्रकौपीनेन्धनवाससां।
उपयोगिपदार्थानां अन्येषामपि लब्धये॥
ग्रामं वा विपुलां भूमिं प्रदद्याच्छ्रद्धयान्वितः।
एवं समाश्रयं कृत्वा तापसानां हितावहं॥
अन्येषामपि लोकानां दुःखिनां आश्रयार्थिनां।
समाश्रयं प्रयच्छामि प्रीयतां मे जगन्निधिः॥ वराहपुराणं।

18. A Math should, by a person having faith in the Shástras, made three-storied or two-storied or one-storied, consisting of different apartments, possessed of an elephant; accommodated with places for meditation, for study, for burnt offering to consecrated fire and the like,

teaching; having the floor levelled even by plaster or stones, equipped with new shelves containing books arranged thereon, decked with circular rows of various fruit-trees, accompanied by reservoirs well-stored with pure and sweet drinking water. And he should endow a village or sufficient land for meeting the expenses, so that the ascetics and the travellers getting shelter (there,) may receive sandals, shoes, umbrellas, small pieces of cloth, and also other necessary things. Thus having established an asylum beneficial to persons practising austerities, and also to other poor people seeking shelter, he should declare—"I am endowing this asylum,—May He who is the support of the universe be pleased with me".—Baráha-Purána.

[The term Math means a monastery, or a residential college, or a college attached to a temple or an asylum for the poor and the ascetics, or a shelter for travellers, or a combination of all these or some of them.]

१९। कारयित्वा दृढ़स्तम्भं शुभं पक्केष्टकालयं।
प्रतिश्रयं सुविस्तीर्णं सभूमिं लक्षणान्वितं॥
सुधालिप्तं गुप्तञ्च सुखशालाविराजितं।
दद्यादनन्तफलदं शैववैष्णवयोगिनां॥
प्रतिश्रयं सुविस्तीर्णं सदन्नं सुजलान्वितं।
दीनानाथजनार्थाय कारयित्वा गृहं शुभं।
निवेदयेत् पथिस्थेभ्यः शुभद्वारं मनोहरं॥ वह्निपुराणम्।

19. Having caused to be made an auspicious and spacious Asylum of burnt bricks, with strong pillars, and large compound, accompanied with distinctive mark, covered with plaster, guarded, equipped with comfortable apartments, and conferring endless religious merit,—should dedicate to the Saiva and the Vaishnava ascetics. And having caused to be made an auspicious, spacious and beautiful house, furnished with good food, and equipped with pure drinking water, and possessed of an auspicious gate should dedicate it for the benefit of the poor and helpless, and travellers.

२०। व्रती यतिर्वैकरात्रं निवसन्नुच्यतेऽतिथिः।
यस्मान्-नित्यं न वसति तस्मात् तम् अतिथिं विदुः॥ यमः।

20. "An ascetic or a religious mendicant living only one night is called an *a-tithi* or guest: because he does not stay long, hence he is known *a-tithi i.e.*, not staying one entire day."

२१। धर्म्माधर्म्मं न जानन्ति विद्यादानवहिष्कृताः।
तस्मात् सर्व्वप्रयत्नेन विद्यादानं प्रवर्त्तयेत्॥ हेमाद्रिधृतं

21. Those excluded from education do not know the lawful and the unlawful: therefore no effort should be spared to cause dissemination of education by gift of property to meet its expenses.

२२ । दानं विशेषफलदं जगतीह नान्यत्
विद्यां विहाय वदनाब्जकृताधिवासां ।
गो-भू-हिरण्य-गज-वाजि-रथादि सर्व्वं
तद्-यच्छतां किमिति भूप भवेन् न दत्तं ॥ वह्निपुराणम् ।

22. In this world, there is no other gift securing special spiritual reward, than the gift (of property for dissemination) of learning that dwells in the organ of speech. O king, does not one who gives the same, became giver of cow, land, gold, elephant, horse, car and the like?

२३ । वाजपेयसहस्रस्य सम्यगिष्टस्य यत्फलं ।
तत्फलं समवाप्नोति विद्यादानात् न संशयः ॥
तस्माद् देवालये नित्यं धर्म्मशास्त्रस्य वा श्रुतेः ।
पठनं कारयेद् राजन् यदीच्छेद् धर्म्मम् आत्मनः ॥ वह्निपुराणं ।

23. "There is no doubt that the fruit of duly celebrated thousand sacrifices is obtained by a person from gift (of property for dissemination) of learning: therefore O king! one should cause the Smriti and Sruti to be daily learnt in the temple of a God, if he wishes for religious merit."

२४ । वानप्रस्थ-यति-ब्रह्मचारिणां रिक्थभागिनः ।
क्रमेणाचार्य्य-सच्छिष्य-धर्म्मभ्रात्रेकतीर्थिनः ॥ याज्ञवल्क्यः ।

24. "The heirs to the property of a *Brahmachári* or life-long student, an *yati* or ascetic, and a *Vánaprashta* or hermit, are respectively the preceptor, a virtuous pupil, and a religious brother residing in the same holy place"--Yájnavalkya.

२५ । Manu—

श्रद्धयेष्टञ्च पूर्त्तञ्च नित्यं कुर्य्याद् अतन्द्रितः ।
श्रद्धा-कृते ह्यक्षये ते भवतः स्वागतैर्धनैः ॥ मनुः ४, २२६ ।
दानधर्म्मं निषेवेत नित्यम् ऐष्टिक-पौर्त्तिकं ।
परितुष्टेन भावेन पात्रमासाद्य शक्तितः ॥ मनुः ४, २२७ ।

25. A man should always without being tired perform with faith *ishta* and *púrta* or *religious* and *charitable* work (= gift); these being made with faith and with honestly acquired wealth become inexhaustible (means of procuring bless): IV, 226. *Dharma* consisting of donation, *religious* or *charitable*, (a man) should always make with a cheerful heart according to his ability (and also) when he finds a worthy object: IV. 227.

PROPERTY OF PERSONS OF HOLY ORDERS.

Holy orders.—The life of a Hindu of the Bráhmana and the other twice-born classes, was divided into four stages. He had to pass the first stage of his life as a *Brahmachári* or student, living with the *Guru* or preceptor of the sacred literature, as a member of his family, and supporting himself by begging; the second, as a *Grihastha* or house-holder, being married when his studentship was over; the third, as a *Vánaprastha* or one retired from the world, residing in some solitary place with persons of the same order, engaged in religious practices and contemplation of the deity, being free from all worldly cares, and living on the vegetables growing in forests, or on alms,—the retirement having the effect of extinguishing his rights to the property he had at the time of retiring, and vesting them in his sons or other heirs; and the fourth, as a *Yati* or itinerant contemplative ascetic, supported by what is voluntarily given by people or by begging in the evening, and taking no more than what is sufficient for the day, and living under a tree or the like shelter.

The *Brahmachári* or student was of two descriptions, *viz.*, *Upakurvána* or an ordinary student and *Naishthika* or a life-long student. The former became a house-holder in due course, while the latter was a student for life, devoted to the study of science and theology, felt no inclination for marriage, did not like to become a house holder, and chose to live, as a perpetual student, the austere life of celibacy.

The ideal of life which the sages contemplated by the different modes prescribed for adoption by persons of higher castes in the different stages of life, was intended to cause actual practice to accord with theory, by giving practical effect to the religious doctrines of *Karma* or *Adrishta*, and Metempsychosis or transmigration, and *Moksha* or liberation from the same. *Adrishta* is the invisible dual force being the effect of *Karma* or good and bad deeds done by a person in past time without beginning, determining respectively happiness and misery at the present and future; Metempsychosis is the assumption by the soul of different material bodies determined by its *Karma* or *Adrishta*; and the *Moksha* or liberation is the release of the soul from the necessity of being confined in some material body. The pleasures and pains of the body are not the pleasures and pains of the soul in reality. It is through *máyá* or illusion that [illegible]ifies itself with the body, and labours under the [illegible] he is the *agent* of bodily acts which are done in

reality by the *agency* of *Prakriti* or nature. This illusion is dispelled by true knowledge which is the only means of attaining *moksha* or liberation, or communion with the Supreme Soul. It is doubtful whether this ideal was actually followed in practice except by a few only.

The law of succession that has already been explained, applies to the property left by a house-holder or an ordinary student.

The above text (No. 24) of Yájnavalkya lays down succession to the property which the persons of these holy orders may have while in such orders, and leave behind on their death.

The property of a life-long student goes to his preceptor; of one retired, to a religious brother; and of an itinerant ascetic, to a virtuous pupil: in their default to one of the same order (or hermitage) or to a fellow-student.

The Hindus of the present day rarely adopt the third and the fourth stages of life. A life-long student, such as is contemplated by the sages, is also rare now. Nor do the ordinary students observe the rules of the Shástras relating to their mode of life, and to the study of the sacred literature.

But there are now persons belonging to certain religious sects of modern origin, such as *Vaishnavism*, that do in some respects resemble the life-long students and itinerant ascetics. They are connected with the well-known *maths* or *mohuntis*. A *math* (मठ) means a place for the residence of ascetics and their pupils, and the like: Text No. 18. The founders of these *maths* were learned Sannyásis or monks of the *Vaishnava*, *Saiva* or *Sákta* sect, who, observing celibacy and leading a pious life of austerity, wandered from one place to another carrying with them an image of the Deity, representing a certain attribute of Him, and teaching the truths of religion to those that attracted by the sanctity of their life, flocked to them. They were prevailed upon by the piety of some Rájás or influential men that became their disciples, to settle in particular localities, receiving grants of land from them, for the maintenance of themselves and their pupils called *chelas*, that accompanied them, lived with them and observed celibacy. Succession to the office of the Mohunta is moulded on the analogy of the rule laid down in the above text of Yájnavalkya.

It has been held by the Madras High Court that a Súdra cannot become a *Sannyási* or ascetic: I.L.R., 22 M., 302. This is undoubtedly the doctrine propounded in the Smritis. But the learned Judges have not taken into consideration the

modern usage introduced by the Vaishnava, and the Tántrika and other systems according to which a Súdra and even a non-Hindu such as a Mahomedan may become a Hindu *Sannyási:* Text No 1. There are many religious sects of ascetics among whom caste distinction is unknown, who accordingly initiate and admit Súdras into their brotherhood, if otherwise qualified. In esoteric Hinduism also, caste is individualistic not hereditary, it being determined by qualification and not by birth. There is ample and abundant authority in the Shástras in support of this view of caste: *ante* pp. 100-103. The highest virtue taught by the Hindu religion is that a man should regard other persons and beings as his own self reproduced in them, as the same Supreme Soul pervades them all: Text No. 2.

Proselytism—was unknown to Hinduism which is distinguished by toleration. Hindus have respect for all systems of religion, and are free to admit the divinity of Jesus Christ, and the divine inspiration of Mahomet. It is perfectly consistent with their religion that God became incarnate in other countries for the purpose of teaching religion to the people there. Thus it is said in the Gíta

यदा यदा हि धर्मस्य ग्लानिर्भवति भारत ।

अभ्युत्थानम् अधर्मस्य तदात्मानं सृजाम्यहं ॥

परित्राणाय साधूनां विनाशाय च दुष्कृतां ।

धर्मसंस्थापनार्थाय सम्भवामि युगे युगे ॥ ४, ७ ८ ।

"Whenever there is decay of Dharma or religion or virtue, O Bhárata, and exaltation of Adharma or irreligion or vice, then I become incarnate for the protection of the virtuous, and for the destruction of evil-doers, and for the sake of completely establishing Dharma, I am born from age to age."—Bhagavat-Gítá, 4, 7-8.

Endowment, Charity and Image-worship.

Dh[illegible].—While dealing with *Dharma* or man's religious duty (Ch. i, verses 81-86), Manu declares (दानम् एक कलौ युगे) that in the present (kali) age, *charity* alone is the supreme *Dharma* or religious duty to be performed by man for his spiritual [illegible]. Vrihaspati also ordains the same rule by saying that [illegible] present age *Dharma* consists of Charity, Compassion, [illegible] control: (Texts No. 12). The three terms imply what [illegible] involves, in fact charity depends on sympathy and

self-sacrifice. The Sanskrit word दान *dána* which is rendered into charity means primarily *gift* and is used to signify transfer of property for the benefit of the public in the advancement of religion, knowledge, health, shelter, maintenance, and the like objects beneficial to man.

When a Hindu gives property for the purposes of *Dharma*, he intends to secure *dharma* in the sense of religious merit by appropriating or applying the property for the benefit of man in two forms, namely, *ishta* or *púrta*, *i.e.*, *religious* or *charitable*; but charity underlies both, as *dharma* consists in donation or charity, and the compound term *dána-dharma* shows that *dharma* is, in this connection, identical with *dána*, *i.e.*, *donation* or *charity* which is called *ishta* or *antar-vedika*, *i.e.*, made within the sacrificial altar, and *púrta* or *vahir-vedika*, *i.e.*, made *outside the altar* or non-sacrificial; so that the gift of property for a religious purpose must necessarily be charitable: (Manu's Texts No. 25; I.L.R., 30 M., 340). What is called *púrta* or charitable work for the benefit of man may take various forms set forth in Hemadri's *Dána-dharma*, of which the prominent ones are given below.

The forms or modes of charity are substantially the same here as in England. They are:—Consecration of images of the Deity in temples for worship: Establishment of Hospitals (आरोग्यशाला): Establishment of *Mathas* (मठ) which are either Monasteries for the Sannyásis or monks or persons adopting holy orders. and their disciples receiving religious instruction; or Residential colleges for students; or Asylums for the poor and the religious mendicants; or Shelters for travellers or Guest-houses; or Temples where education is imparted to resident students; or a combination of some or all of them: Establishment of *Sattras* (सत्र) or Alms-houses for distribution of food to the poor at all times; Establishment of *Atithi-sálas* (अतिथिशाला) or places of shelter for pilgrims, wayfarers and ascetics who do not stay more than one day: Establishment of Schools (पाठशाला) for dissemination of knowledge; (the last three are often connected with temples of Gods): Excavation and consecration of wells, tanks and other reservoirs of water, for drinking, bathing or irrigation purpose; (consecration implies dedication to the public): Planting and consecrating shady trees for the benefit of wayfarers: and the like. The Texts Nos. 12-23 describe some of the numerous forms of charity. As religion and charity are intimately connected, charitable institutions are, oftener than not, associated with temples for the worship of

some image of the Diety. It should be noticed that an endowment for the worship of a God amongst Hindus is a form of charity, whereby the Bráhmanas and the poor specially, and the public generally are benefitted; the Bráhmanas being the repositories and preceptors of religion, the Hindus are benefitted by what is intended to support the Bráhmanas, their spiritual guides: they are deemed public officers or servants.

The word *Dharma* therefore, conveys the idea of *charity*; hence when a Hindu makes a gift of property for the purpose of *Dharma* he clearly intends to dedicate the same to Charity. The general but absolute intention to appropriate the property to charitable purposes is manifest when property is given for *Dharma*, the particular mode in which the same is to be carried into effect is left uncertain; and it is not difficult to ascertain what form of charity is most required in the locality, and intended by the donor, though not expressed. But unfortunately a gift for *Dharma* has been held void for vagueness and uncertainty: I.L.R., 21 B., 646 *affirmed* 23 B., 725. Their Lordships refer to the different meanings of the word *Dharma*, given in Wilson's Dictionary, that support the conclusion as to vagueness. But it is submitted with great deference, that although the word *dharma* bears more than a dozen different senses, a Hindu making a gift of property for *dharma*, specially while contemplating his death, should be taken to use that term in the sense consistent with usage and gift of property and to intend only *charity* by that word, or the *religious merit* resulting from *charity*. Three of the senses of that word are (1) पुण्य religious merit, (2) क्रतु sacrifice, and दान donation, of which the first is the effect of the latter two, namely, religious and charitable works. A popular religious maxim says,—

एक एव सुहृद्-धर्मो निधनेऽप्यनुयाति यः ॥

which means,—"Dharma is the only friend that accompanies (the soul of) a person even after death." Here (पुण्य) religious merit arising from religious and charitable works is meant by *Dharma*. In dealing with the question, whether a gift of property for *Dharma* is void for uncertainty, Mr. Justice Subrahmania Ayyar has held that a Hindu donor is to be presumed to have used the term in the sense of *ishta* and *púrta* donations enjoined by the Shástras, that meaning being perfectly well-settled: *Partha* v. *Thiru*, I.L.R., 30 M., 340.

Charitable institutions are badly wanted in poor India, and our Courts should carry into effect the gifts for *Dharma*, which

are undoubtedly intended for charity, by supplying the particular mode which is left uncertain, instead of rejecting them on the ground of vagueness.

Mathas, Mutts or Mattams and Sattras.—There are many *maths* or monasteries in all parts of India and specially in Deccan that were founded by the disciples and followers of the great religious teacher Sankara-Achárya, the Mohunts of which are called after the names of the ten disciples of the four most favourite pupils of his; hence the *maths*, are called *Das-námis*, namely, (1) *Giri*, (2) *Ságar*, (3) *Parvat*, (4) *Púri*, (5) *Saraswatí*, (6) *Bhárati*, (7) *Tírtha*, (8) *A'sram*, (9) *Ban*, and (10) *Aranya*. They are *Saivas* and worship the *Lingam* or Phallic Symbol established in the temples connected with the *Maths* the most ancient of which are called Paramparágata or come down in the course of succession through many generations. The Sannyásis attached to them often adopt infants as their *chelas* or pupils or religious sons, who are intended to be initiated as Sannyásis observing celibacy. The natural fathers give their sons to be so adopted by them, when the adopting Sannyásis are possessed of considerable property to be inherited by the sons by becoming their *chelas* or spiritual sons and heirs.—*Gosain Ramdhan* v. *Gosain Dalmir*, 14 W.N., 191.

The Madras High Court (I.L.R., 2 M., 175, 179) describes the origin of Mattams which appear to be the same as *Mathas* or Mutts thus.—"A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of the order, and instructs in its religious tenets. Such of these disciples as intend to become religious teachers, renounce their connection with their family and all claims to the family wealth, and, as it were, affiliate themselves to the spiritual teacher whose school they have entered. Pious persons endow the school with property which is vested in the preceptor for the time being, and a home for the school is erected and the *mattam* constituted." It should, however, be observed that it is not only those who intend to become religious teachers, but it is also those who intend to devote their undivided attention to their spiritual advancement during the rest of their life, that renounce their connection with their family and family property, and become affiliated to the preceptor.

"The object of these Mutts is generally the promotion of religious knowledge, the imparting of spiritual instruction to the disciples and followers of the Mutts, and maintenance and

strengthening of the doctrines and tenets of particular schools of philosophy": I.L.R., 27 M., 435.

Mutts of the above description are distinguished from temples in which property is dedicated for the worship of a God primarily for spiritual purposes, and the worshippers are beneficiaries in a spiritual sense; the endowment is indirectly beneficial to the servants of the temple as well as to the objects of charity, as the income cannot but ultimately go for the benefit of human beings; for the God consumes or wants nothing.

The common object of both is the spiritual welfare of man. This is explained in a very learned judgment of Chief Justice Sir Subrahmania Ayyar, in which it is observed—"The two classes of institutions, *viz.*, temples and mutts are thus supplementary in the Hindu Ecclesiastic system, both conducing to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge—the presiding element being the deity or idol in the one, the learned and pious ascetic in the other." I.L.R., 27 M., 454.

It is, however, submitted with great difference, that the Deity is the presiding element in both, there being no mutt without its Deity: the worship is prominent in both, but religious knowledge is added to it in one of them.

Maths both *Saiva* and *Vaishnava* are found in many parts of Bengal. It is worthy of remark that almost all the *Dasnámi maths* in Bengal were founded by Bráhmanas come from the North-West Provinces, and not by Bráhmanas domiciled in Bengal. And the persons that are now connected with these *maths* either as *mohunts* or *chelas* are fresh arrivals from the North-West. But these have lost their original character of being schools of religious teaching and have now become rather secular. The heads of these institutions are not pious teachers of religion, such as their founders had been; and all the religious teaching they impart to their disciples is an aphoristic prayer secretly communicated to each of them. The *mohunts* and the *chelas* are generally not learned persons but are ignorant of the Shástras and even illiterate, having no access to their religious books. They observe celibacy in so far that they have no wives with them: for, as their early life is not known it cannot be said that all of them are unmarried. Some leave their homes in disgust, while others appear to have fled from their country after having committed heinous crimes. Religion, however, is not the object for which people resort to these places. Those

that hope to be maintained by the *mohunt* and especially his own relations become his *chelas*. Acquisition of property by fair means or foul, appears to be the principal object of their care. And the endowed propety is generally misappropriated. The intention of the donors may be more usefully carried out by appropriating the large property so endowed, to the dissemination of knowledge of the Sanskrit language and Hindu theology.

But most of the Vaishnava mutts or religious establishments in Bengal, Behar and Orissa were founded by Bengali Bráhmanas and Káyasthas who were disciples and followers of Chaitanya the great founder of Vaishnavism in Bengal.

There are religious establishments called *Maths* or *Sattras*, especially those belonging to the Vaishnavas of which the Mohunta or head may marry, or rather may live with his wife while holding that office It should however be observed that marriage is not a disqualification in any case. A married man renouncing the world and adopting a holy order may become a Sannyási and then he may become the head of a monastery of ascetics or monks.

Sattras are religious and charitable establishments like mutts, the distinctive idea conveyed by the term being the distribution of food and drink. These are invariably founded in holy places such as Benares. The primary meaning of the word *Sat-tra* is, Protector of Existence. The charitable institutions affording food and shelter to travellers, religious mendicants and pilgrims were absolutely necessary in this country where Hotels were unknown.

Property of Maths.—The property belonging to these *maths* is regarded as *Debutter* belonging to the deity established by the founder. The trustee or manager is called *Mohunt*, Sebayet, Sevak, Adhikárí, Paricharak, Dharma-kartá, or the like.

With respect to the property of the generality of *Mattams*, the Madras High Court observes,—"The property is in fact attached to the office (of the head of the institution) and passes by inheritance to no one who does not fill the Office. It is in a certain sense trust property, it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with

his *Muttam*, and debts so contracted might be recovered from the Mattam property and would devolve as a liability on his successor to the extent of the assets received by him" Their Lordships add that there may be *mattams* of which the property may be held on different conditions and subject to different incidents I L R, 2 M., 179; 10 M, 375. It has been held in the later case that a debt incurred by the head of a Mutt is not binding upon his successor, unless it was necessary for the maintenance of the Mutt I L R, 27 M., 426.

A distinction is drawn by the Madras High Court between Temples and the aforesaid Mutts, in the former of which the endowed properties are deemed vested in the presiding God treated as a juristic person, the management being vested in a trustee; while the property of a Mutt is vested in the head of the institution as holder of the office as a *corporation sole*: he may be appointed also a trustee of a temple or Deva-sthánam and its endowed property, as when such an endowment is attached to a Mutt, then he is bound to apply the entire income to the purposes of the temple and would be accountable as trustee: I.L.R., 27 M., 435; 28 B., 215.

Three descriptions of endowed property.—Thus we have to consider the incidents and conditions of three descriptions of property. (1) Property of a temple or Deva-sthánam which is vested in the ideal juridical or juristic person, *viz*, the God to which it is dedicated, of which the sebait is a mere manager and trustee who is to carry out the specific purposes of the endowment, *i.e*, the daily worship and the periodical ceremonies and festivals, —purposes defined and settled by usage and custom, (2) Property of *mattams* which is vested in the preceptor or head of the institution, as a *corporation sole*, who has at his disposal the income derived from the endowments of the mutt as well as from money-offerings of its disciples and followers; the large surplus of which left after carrying out the defined and specific but limited purposes of the Mutt requiring the expenditure of a small part of the income, may be expended by him, at his will and pleasure, it being his *moral* obligation to devote the surplus to the religious and charitable objects and in the encouragement and promotion of religious learning, as he is expected to do; (but see 34 I.A, 78 = 30 M., 138, and p 488 *infra*): (3) Property held by a Mutt or other charitable institution as a judicial person and managed by its head as a trustee: thus, it is observed by the Chief Justice of Bombay,—"A math, like an idol, is in Hindu law a judicial

persona capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency": *Babajirao v. Laxmandas*, I.L.R., 28 B., 215, 223.

Temples are oftener than not combined with Mutts or Asylums of ascetics for religious instruction, and other persons, and with other charitable institutions, as is clear from the original texts cited above.

The personal property of the head as well as of other members of a Mutt is also to be taken into consideration, as distinguished from the endowments.

God & Mutt owner, Manager, Trustee, Debt & Alienation.—It has already been shown that amongst Hindus of the present day, *Dharma, i.e.*, religious duty or act is identical with charity; and charitable institutions established by orthodox Hindus are invariably connected with Images of Gods consecrated either by themselves or by their ancestors. The property intended for charitable purposes is formally dedicated to the Deity by a deed of endowment containing directions for the application of the income to religious and charitable purposes which are specified or indicated. The property is vested in the God deemed to be a Juridical or Juristic person, and as such capable of holding property; and this appears to be the true legal view when the dedication is of the completest kind; 2 I.A., 145; 31 I.A., 203.

"It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it, must in the nature of things be entrusted to some person as Sevait, or manager: 2 I.A., 145, 152. And this carries with it the right to bring whatever suits are necessary for the protection of the property, every such right of suit is vested in the Sevait, not in the idol": 31 I.A., 203, 210.

"It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir." 2 I.A., 152.

Thus, "notwithstanding that property dedicated to religious purposes is, as a rule, inalienable, it is competent for the Sevait, in the capacity as sevait and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and

other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them": 2 I.A., 151.

The above observations with respect to a God apply also to a Math deemed a Juridical person for holding property. And "when property is vested in a Math, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is in the manager, but it is the established practice that the suit would be brought in that form. And the manager has in relation to such a suit a distinct capacity: he is therein stranger to himself in the personal and private capacity in a Court of Law": I.L.R., 28 B., 223.

It is, however, worthy of special remark, that the Sevait of a religious and charitable institution is bound to keep the expenditure within the income left after setting apart out of it what is sufficient for meeting the necessary occasional expenses. And if debts have to be contracted for an unexpected necessity, the same ought to be paid off by savings from the income, secured by means of reduction of the scale of expenses; for, the expenses of worship may be reduced to a nominal figure, and the expenses for charities admit of reduction and even of temporary suspension, so that the corpus of the endowed property may be saved and the institution maintained. The corpus must not be transferred, and the necessity ought to be met, if possible, by pledging the revenue only, or by unsecured debts, to be paid off, by reduction of expenditure: I.L.R., 27 M., 465, 472-3.

The managers of these endowments are deemed to be in the position of trustees as regards their property in all cases without exception, and in the position of holders of an office or dignity as regards their services and duties: (33 I.A., 145 = 29 M., 283). The distinction drawn by the Madras High Court in favour of the head or preceptor of Mattam, seems to owe its origin to the false analogy of a *Corporation sole.* Assuming that the defined and specified purposes of a Mutt are very limited, and that a large part of the income derived from the endowments and the money-offerings of disciples, is at the disposal of the head of the Mutt, which he is *expected* to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning, it is difficult to understand, why his obligation to devote the surplus income to such religious and charitable objects should be one in the nature

only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion, and he is in no way, whether as a trustee or otherwise, accountable for it in law: *Vidyapurna* v. *Vidyanidhi*, I.L.R., 27 M., 455. The money-offering, if made to himself personally, may belong to him absolutely, but if he is *expected* by the donor, to spend the surplus income of the endowment, for charitable and educational purposes, then although he may be at liberty to choose any one or more of those purposes, on which he may spend the whole of the surplus, yet he must be held to be under legal obligation to fulfil the *expectation*. A Hindu granting and entrusting to a pious man, property as an endowment for religious and charitable purposes, cannot be presumed to give him the general power of appointing the income or the surplus income of the endowed property to any object he pleases, but must be taken to grant him the special power of appointing the surplus, if any, left after carrying out the defined and specified purposes, to objects *ejusdem generis*, in other words, to "objects of religious charity and in the encouragement and promotion of religious learning,"—and to intend that he must whether as a trustee or otherwise, be accountable in law for the due exercise of the power. Accordingly it is held by the Privy Council that the surplus income should be invested for the benefit of the Mutt or temple, and the Court may be moved for a settling scheme for its protection and expenditure: *Prayag* v. *Tirumal*, 34 I.A., 78 = 30 M., 138.

The conclusion to which we come, is, that the sebait has no legal property which in contemplation of law belongs to the God, or Math or religious and charitable establishments, but he has only the title of manager of the endowment. He cannot alienate the endowed property but can create derivative tenures if beneficial to the estate: *M. R. Shebessuri* v. *Mathoora*, 13 M.I A., 270. But in the absence of legal necessity, he cannot grant a permanent Mokarari lease; though the rent fixed was adequate at the time, it would be a breach of duty in the trustee to deprive the endowment of the benefit of enhancement of rent, and the lease cannot enure beyond the grantor's life: *Abhiram* v. *Shyama*, 14 W.N., 1 = I.L.R., 36 C., 1003. His powers are similar in some respects to those of a manager of an infant's estate: 2 I.A, 145. The principles of *Hanooman Persad Pandey's* case apply to transfers made by him: I.L.R., 24 C., 77. He may transfer for legal necessity which, in this connection, means the preservation of the estate,

keeping up the worship, defending litigation, repairs of the temple and other property, restoration of the image, and so forth: I.L.R., 22 C., 989; 23 W.R., 353. But as already observed, the corpus must not be allowed to be transferred, when the necessity can be met by other arrangements: 27 M., 472-3.

A trustee of a religions institution has no power to alter the purpose for which it was founded; accordingly it has been held that he cannot permit a temple dedicated to the worship of the God Siva, to be entered into for worship by a low caste who originally used to manufacture spirituous liquor from the juice of palmyra palm, and was on that account excluded from the temple by custom: *Sankara* v. *Raja*, 35 I.A., 178.

Succession to managership of Mutts.—The rule of succession to the office of Mohunt or a head of a Mutt is founded and moulded on the above text of Yájnavalkya (Text No. 24) which provides that a virtuous pupil, a religious brother residing together, and the preceptor, are respectively successors to the property left by an ascetic (*Yati*), a hermit (*Vána-prastha*) and a life-long student (*Brahmachári*). These latter were all *Sannyásis*, the distinction being due to the different circumstances under which they had become so. If the distinction be thrown out of consideration, then the succession of a *chela*, a *gurubhai*, and a *guru* resembles the succession of a pupil, a religious brother and the preceptor to the property of the said persons.

If a *Sannyási* attached to a Mutt, other than the Mohunt, dies leaving property it would go to his *Chela*, *Guru* or *Gurubhai*, on the analogy of the said text, as well as, on the analogy of succession of son, father and brother, a *chela* or adopted pupil is alike to an adopted son; the spiritual relationship is substituted for the natural one.

The succession to the office is moulded on the same analogy, the *chela* is primarily entitled, but his succession is regulated by the usage of the *math*: 7 W.N., 145. In some cases the present *mohunt* is considered to have the power of nominating one of his *chelas* or of his fellow-disciples or *guru-bhais* as his successor, the choice often falls on his own relation, if any, amongst them. In others, the successor is elected by the neighbouring *mohunts*, or selected by the ruling power from amongst the *chelas* of the deceased *mohunt*. In some, again, the office devolves on the senior *chela* of the last *mohunt*. The particular usage is to be proved in each case: (11 Moore 405). According to the usage of some Mutts, either nomination by the late

Mohunt, or election by neighbouring Mohunts, is necessary for the succession of a Chela: I.L.R., 1 A., 539.

There is however, a distinction between the succession of a *chela* to the estate of his *Guru*, and his succession to the trusteeship of the property of a Mutt, of which the *Guru* was the Mohunt or Superior, and as such used to exercise authority over the congregation of *Sannyásis*. The successor should be a person who must command respect of all the members of the establishment. Hence his qualification for becoming the head, should be evidenced either by the nomination of the late Mohunt, or by election by members of the fraternity or neighbouring Mohunts of the same sect, or by both. The chela would be entitled if not disqualified. But the *chela* being the heir to his *guru's* personal property, neither nomination nor election can affect his right of succession.

An ascetic being a mere life-tenant cannot alter the succession to the trust by an act of his own: 7 W.N., 145, 148.

A decree properly obtained against a Sebait or head of a Mutt is binding on his successor, and may operate as *res judicata*: I.L.R., 29 M., 553; *Raja* v. *Basanta*, 9 L J., 597.

Private and Public Endowments.—Endowments are either public or private. In the former the public is interested, and in the latter certain definite persons only are interested. When property is dedicated to charitable, educational or religious uses, for the benefit of an indeterminate body of persons, the endowment is a public one; and when property is set apart for the worship of a deity of a particular family, in which no outsider is interested, the endowment is a private one. A *math* or *mohunti* is a public endowment.

The distinction between private and public endowment is an important one; for it has been held by the Privy Council that "in the case of a family idol, the consensus of the whole family might give the estate another direction"—(*Konwar Doorga* v. *Ram*, I.L.R., 2 C., 351; *Govinda* v. *Debendra*, 12 W.N., 98); for instance, if all the members of the family renounce Hinduism and choose to throw the family god into the waters of the Ganges, and themselves enjoy its property, no outsider can raise any objection, the endowment being a private one, the public is not interested. The gift of such a god and its property, has been held valid: I.L.R., 17 C., 557.

The above observation of the Judicial Committee is liable to be misconstrued: the term "whole family" must mean all male and female relations of the founder of the private endow-

ment, who are interested in maintaining the worship and thereby preventing the evil effect arising from non-worship of the God, to the founder who dedicated the property for conducting the worship, with the view that he might not incur sin should the God consecrated by him be not worshipped for want of funds. It follows, therefore, that his descendants other than those who as his heirs are in charge of the property, are interested in maintaining the worship, and are entitled to prevent breach of trust by the latter, so detrimental to the founder's spiritual welfare.

Religious endowment always public?—This distinction, however, appears to be contrary to the true intent of the Hindu law of endowment; according to the principles of which, a trust for the worship of a consecrated image of God is to be regarded, as one created for public charitable purposes; *Manohar* v. *Lakhmi*, I.L.R., 12 B., 247. The distinction seems to be borrowed from English law; but the Hindu law, unlike the English law, makes no distinction between the religious endowments, on the ground of such as are established for the worship of a household deity, being assumed to be a private one, and not intended for the benefit of the public: every image when originally consecrated must have been a household deity, but in no case is an outsider prevented to worship what is called a family god, if he wishes; and it would be contrary to religion and usage, and deemed sinful to do so: *Rupá* v. *Krishnaji*. I.L.R., 9 B., 169. Every religious endowment is beneficial to the Hindu community in a religious point of view, and it benefits at least the officiating priest in a secular point of view—who must be a Bráhmana deemed to be a public servant according to the organisation of Hindu society, holding, as he does, the office of a religious instructor of the Hindus: *Bhupati* v. *Ram*, 14 W.N., 18, 22.

Images.—The images worshipped by the Hindus are visible symbols representing some form of the attribute of God contemplated as having one only of His threefold attributes, upon which is based the Hindu idea of Trinity, namely, God the Creator, God the Preserver, and God the Destroyer, the same perhaps, as God the Father, God the Son, and God the Holy Ghost.

The images may be made of any of the substances mentioned in the Texts Nos. 4-6.

The object of worship is not the image, but the God believed to be manifest in the image for the benefit of the worshippers

who cannot conceive, or think of, the Deity, without the aid of a perceptible form on which he may fix his mind and concentrate attention, for the purpose of meditation. The lump of metal, stone, wood or clay forming the image is not the God, but the invisible *personified* Deity manifesting itself to the devotees by means of the image, is the God to a Hindu.

When an image has once been consecrated with appropriate ceremony, it must be worshipped, and it cannot be replaced by another image, unless it has become unfit for worship by reason of any of the grounds stated in the Text No. 7: (7 C.L.R., 278). If the image is cracked, broken, mutilated, or lost it may be substituted by a new one duly consecrated. Fresh consecration or substitution is also necessary, if the image be polluted in any way. Removal from the temple, amounts to pollution in the case of an image of Siva only in some cases. A new image cannot be substituted when the original one is free from any defect of the kind mentioned. Nor can the old image be replaced by a new one, by reason of the occurrence of any defect therein, such as cracking, when it is an ancient image believed to have been established by a god, or by a saint, or by an Asura, or by a remote ancestor of a family, or when its origin is unknown. Nor is a new image necessary if it can be restored by rejoining its broken parts together, as when the same is made of metal, and a limb is severed. See Texts Nos. 7-10. When an image is to be replaced by a new one, it must be done as soon as possible; for the damaged image ceases to be the abode of God, and cannot be worshipped, in those cases in which substitution of a new image is necessary: Texts Nos. 7-8.

It should be observed that the destruction of an image does not destroy the endowment; *Purna* v. *Gopal*, 8 L.J., 369.

Invisible spirit, not material image, Juridical Person.- When a Hindu dedicates property for the worship of the Deity by means of an image, which is directed to be set up and consecrated, the property is by a legal fiction deemed to be vested in a Juridical, Juristic or Judicial (28 B., 223) person. The God which is believed to be manifested in the consecrated image ought to be deemed the fictional person holding the property. The material image is merely a means of worshipping the God. The consecrated image is the body, of which the invisible spirit is the soul. The consecrated image cannot, apart from the spirit, be regarded as forming the Juridical person; for when it becomes damaged and unfit for worship, and is to be replaced by another image, it must cease to be the Juridical person. Where shall

the property remain during the interval between the dates of the damage and of the restoration, except in the invisible Deity for the worship of which the property was dedicated?

But a different view has been unwarrantably deduced from the following observations of the Court in a case in which the present question was not in issue at all,—"We believe that according to Hindu notions when an idol has once been, so to say, consecrated by the appropriate ceremony performed, and Muntra pronounced, the deity of which the idol is the visible image, resides in it, and not in any substituted image, and the idol, so spiritualised, becomes what has been termed a juridical person. . It does not by any means follow that because the idol now in question has passed into the possession of the defendant, together with the property dedicated to it, it has thereby fallen into the condition of a lost or broken idol which, by Hindu Law, may be replaced." 7 C.L.R., 278, 280-1.

In this case the property was dedicated for the worship of the God Vishnu by means of a consecrated image; the image originally consecrated for worship and the property were both sold in execution of a money-decree against the Sebayet; the purchaser brought the image to his house and continued to conduct its worship; after some time the Sebayet's son consecrated another image and instituted the suit to recover the property, but not the image originally consecrated. It was contended on his behalf that the removal of the first image from its original temple destroyed its sanctity, and justified its replacement by the second image, and that at any rate the property should be appropriated to the worship of the second image also. The first contention was held untenable, and with it the second contention also necessarily fell to the ground. No second image can be set up when the existing image continues fit for worship, the Deity being intended by the founder to be worshipped by means of only one image, and not simultaneously by two.

There is nothing in the above observations from which it can be inferred that the consecrated image which is the visible spiritualised symbol of the Deity, and not the Deity itself, is the Juridical person holding the property; that was not the question for consideration by the Court. On the contrary, it follows from the very fact that a consecrated image must be replaced by another, under certain circumstances,—that it is the Deity, and not the image, in which the property must be held to be vested as the juridical person.

But nevertheless from the above observations it has been concluded that the consecrated image is the deity and juridical person capable of holding property, and it has been held that a bequest to a god to be established and consecrated by the executor after the testator's death is void, as being a gift to a person not in existence at the testator's death, according to the Tagore case: I.L.R, 25 C., 405; 29 C., 260; 30 C., 521.

There seems to be a misapprehension and misconception of the ideas and intention of the Hindus making gifts of property for religious purposes to be carried out by the consecration of an image. These rulings appear to be based on the assumption that the gift is made to the material image to be established after the donor's death; whereas in reality such gifts are made to please the invisible Deity believed to reside in, and spiritualise, the consecrated image; properly speaking, no gift can be made to the Deity; for, how can a man make a gift of property to the God who has created him and the property which by an illusion or delusion he thinks himself to be the owner of, for a few days? Neither the invisible spirit nor the consecrated image can be deemed to become owner of property, by gift of property made to worship them: 14 W.N., 18, 37. Besides, it seems to be overlooked that the rules against perpetuity and remoteness do not apply to gifts for religious and charitable purposes. This is expressly stated in the Transfer of Property Act, Section 17, with respect to gifts *inter vivos*; and the same principle is applicable to gifts by wills which are deemed as gifts on the last moment of the lives of Hindus: *Parbati* v. *Ram*, I.L.R., 31 C., 895.

The validity of such gifts had all along been recognised, as appears from the following cases, namely, 1 Knapp 245; 8 M.I.A., 66; 6 I.A., 182; I.L.R., 9 B., 491; and I.L.R., 14 C., 222; which are noticed. It is doubtful whether it is a legitimate and proper use of what is a mere fiction for explaining certain legal incidents. The dedicated property may as well be deemed vested in the Sebayet as trustee; the donor never declares the person in whom the property is to be vested; all that he intends is, that the rents and profits of the dedicated property must be appropriated to the worship. The fiction is introduced by lawyers and judges for convenience, but it is not absolutely necessary that the property must be deemed as vested in the Deity or in a fictional person. Besides, the idea,—that their Gods are deemed born like human beings,—is most repugnant and abhorrent to Hindus who have knowledge of their Shastras.

The difficulty has now been removed by the decision of a Full Bench of the Calcutta High Court, holding that where a testator directed his executors and trustees to spend the surplus income of his estate, left after certain payments, in the worship of the Goddess Kali after having consecrated an image of the Goddess,—the gift was perfectly valid, the principle of the Tagore case being inapplicable to such gifts; for neither the consecrated immage nor the Deity manifested in it can become owner of property according to Hindu law: *Bhupati* v. *Ram Lal*, 14 W.N., 18.

Family Gods and Dedication.—Every respectable Hindu family has its family god. In most cases there is no property dedicated to it; the worship is voluntarily conducted by the descendants of the founder. If any member refuses to bear the expenses of his *páli* or turn of worship, in such a case it has been held that he cannot be compelled to do so, the obligation being a moral one: 5 W.R., 29.

In some cases, the worship of an idol is made a charge upon certain property that is not entirely dedicated. Such property is heritable and transferable, subject to the charge (I.L.R., 5 C., 438 = 6 I.A., 182). But the mere fact that the rents of a property have been applied for a considerable period to the worship of a god, is not sufficient proof of dedication: I.L.R., 2 C, 341.

When any property is entirely dedicated for the worship of a Deity and no person has any beneficial interest in the property, it becomes absolute or complete *Debutter*. An endowment of property for religious and charitable purposes may be absolute and complete, subject to payment of temporary charges, and subject to a provision for remuneration of the trustee; in such cases, the corpus cannot, in whole or part, be liable to attachment for the trustee's personal debt, by reason of the surplus left after due performance of the trusts, being held by him for his own benefit as remuneration: *Bishen* v. *Nadir*, I.L R., 15 C., 329. An endowment for religious and charitable purposes may be created by a will to take effect after the determination of a life-estate: *Gobind* v. *Gomti*, 30 A., 288. It has been held that the mere execution of a document dedicating property to a family god, is not dedication in the absence of any act following it, showing that the executant did divest himself of the property:—*Watson* v. *Ram*, I.L.R., 18 C., 10.

It should be observed that in order to constitute any property *Debutter*, it is necessary to prove that the property was

dedicated, and that the rents and profits of the same have all along been appropriated to the worship: 8 W.R., 43; 2 Hay 490. The treatment of the property by the donor and his successors is the test whether the endowment is real and *bona fide*, or nominal and colourable, made for defrauding creditors: 3 W.R., 142; 4 W.N., 405. In the absence of proof of dedication, mere appropriation for some time, of a portion of the profits to the worship (18 W.R., 399), or the release of the land by Government on the ground of such appropriation (21 W.R., 365,) or mere purchase of the property in the name of the God (11W.R., 13, affirmed, 20 W.R., 95), or the mere execution of a deed of dedication (18 C., 10), is not sufficient proof of dedication.

The powers of a manager of the property dedicated absolutely for the worship of a family God are the same as those of the manager of the property of a mutt, already dealt with. In a recent case (I.L.R., 27 M., 465, 472-3) the law on the subject is explained as follows,—"According to Indian common law relating to Hindu religious institutions such as the present, the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be created with reference to such endowments; but they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged. The revenue thereof may alone be pledged for the necessities of the institutions. *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (13 M.I.A., 270), *Narayan* v. *Chintaman*, (I.L.R, 5 B., 393), and *Collector of Thana* v. *Hari Sitaram* (I.L.R., 6 B., 546, 552), are direct authorities in support of this statement of the law. Nor do I think that *Prasanna Kumari Debya* v. *Golabchand Baboo* (2 I.A., 145) is to be understood as recognising any wider powers in the managers of such institutions." Then their Lordships go on to observe that the necessary expenses can, and should, be fully met from the income of the endowments, by reducing, if necessary, the scale thereof, as has already been stated: *ante* p. 488. In fact no valid endowment can be created by an instrument whereby the power of alienation is vested in the so-called sebayet: 9 W.N., 154.

Removal and appointment of trustee—If a *sebait* or trustee of a *public* endowment becomes guilty of a breach of trust, the Advocate-General or with his written consent *two* or more persons directly interested in such trust, may institute a suit in the High Court or the District Court for the removal of the trustee according to Section 539 of the Civil Procedure Code.

Like the Courts of Equity in England the Civil Courts in India have jurisdiction over trusts so as to settle schemes (30 M., 138), or to deal with managers of public Hindu temples and charities, and members of committees, remove them from their position as managers or members, appoint a committee to supervise and control managers, and appoint a new manager or member. A manager mistaking his true legal position and arrogating to himself the position of owner, is not liable to be removed by reason only of such error of judgment: I.L.R., 21 B., 556; 22 B., 493; 22 M., 361.

Section 14 of Act XX of 1863, however, provides that any interested person may bring a suit in the District Court against a trustee guilty of misfeasance or neglect of duty or breach of trust, for the specific performance of any act, or for damage, or for the removal of the trustee. But it is necessary that the plaintiff, before he brings such a suit, should obtain the leave of the District Judge, by presenting a preliminary application.

But section 14 does not apply to a Committee appointed under Act XX of 1863, who may, therefore sue without previous leave, their manager or superintendent for damages for misappropriation, and for injunction, (I.L.R., 9 C., 133); they may dismiss or suspend the superintendent for good and sufficient cause; (3 M.H.C., 334; I.L.R., 21 M., 179); or join any other person with the manager who must obey: I.L.R., 6 M., 58; 17 M., 212. Nor does that Section apply to a suit by a trustee against an ex-trustee: I.L.R., 6 M., 54.

It has been held that Act XX of 1863 applies to endowments to which the provisions of Reg. XIX of 1810 were applicable. All religious establishments, for the maintenance of which, land had been granted either by the Government or by individuals, were subject to that Regulation, whether or not the Board of Revenue took them under its management: I.L.R., 7 C., 767; 9 C.L.R., 433. In the latter case the endowment was created subsequently to 1810 A.D.

The provisions of the Indian Trust Act do not apply to Hindu charitable trusts: I.L.R., 28 M., 517. But it has been held by the Calcutta High Court that that Act is applicable to a trust in which the settler, the trustees and the *cestuis que trustent* are all Hindus, provided such trust does not violate any provisions of Hindu law: I.L.R., 32 C., 143.

Act XX of 1863 does not apply to private deities: *Protap* v. *Brojo*, I.L.R., 19 C., 275; 14 M., 1. But the trustees of private endowments are equally with those of public ones,

subject to the jurisdiction of the courts, and are liable to be removed for misconduct.

Succession of sebayet of private endowment.—The donor or founder and his descendants have the right to appoint the manager or *Sebait* (I.L.R., 29 A., 663), and to direct the mode of succession to the office of the *Sebait.* If the deed of endowment is not forthcoming, or contains no such direction, the devolution of the trust depends upon the usages of such institution, if any; *Bhagaban* v. *Ram,* I.L.R., 22 C., 843. In the absence of any evidence that there has been some usage, course of dealing or some circumstances to show a different mode of devolution, it passes to the heirs of the donor or founder where the Sebayetship has not been otherwise disposed of: I.L.R., 5 C., 228; 17 C., 3 = 16 I.A., 137 A person may be appointed sebait with a power of appointing his successor; if he dies without exercising the power, the office reverts to the donor or his heirs, and so also when the succession directed by him fails: 13 W.R., 396; I.L.R., 12 C., 375; 25 C., 354; 29 C., 716; 18 A, 227. If there be no reliable evidence as to the foundation of a religious endowment, or as to its terms or conditions; the legal inference is that the title to the property, or to the management and control of the property follows the line of inheritance from the founder: 31 I.A., 203 = 32 C., 129 = 8 W.N., 809. Trusteeship with power to appoint a successor is an estate recognized by law, and may be prescribed for; and the assignment of trusteeship by one becoming trustee by prescription, to a person entitled to be sebait according to the founder's rule,—is valid by way of an exception to the general rule against transfer of trusteeship: I.L.R., 24 M., 219.

When a Mitákshará joint family is the Sebait of an endowment, a male member becomes entitled to be a Sebait from birth, and may call into question an improper alienation by his father and uncle: *Ram* v. *Ram,* I.L.R., 33 C., 507. But the senior member is entitled to exercise the right of management until partition, before which the other members cannot claim to exercise the right by rotation: I.L.R., 32 M., 167.

Alienation of sebayet's rights.—The office is not saleable, I.L.R., 4 M., 391; 16 M., 146. It has been held by the Judicial Committee that an assignment of the right of management is beyond the legal competence of a trustee under the common law of India, and that the assignment being of a trusteeship for the pecuniary advantage of the trustee, cannot be validated

by any proof of custom: 4 I.A., 76. In another case it was held that the sale of the right of management and of the endowed property was null and void, in the absence of a custom allowing them: 27 I.A., 69. Nor is it divisible where there are more trustees than one, inasmuch as they hold as joint-tenants: I.L.R., 19 A., 428. But if they have a pecuniary interest such as a right to the votive offerings, then they may come to a *quasi*-partition, *i.e.*, to an arrangement whereby each of the *Sebayets* may, by turns, become the sole manager for a definite term; 19 W.R., 28; I.L.R., 13 B., 548; 22 W.R., 437.

Although the *Sebayet's* right to worship or to surplus profits is not transferable to a stranger (3 W.R., 152), nor in execution of a decree against him, (7 W.R., 266; 15 W.R., 389), still the same may be transferred to a co-*Sebayet* or to one who is the next in the line of succession (I.L.R., 6 B., 298), so that the succession may be deemed to be accelerated; hence it has been held that a transfer to one only of three persons entitled to become the next *Sebayets* is not valid: I.L.R., 15 M., 183.

There seems to be a conflict of decisions on the subject of the transfer of the *Sebaiti* right to a co-*sebait* or to one next in succession. But they may be reconciled thus:—if the transfer be for the benefit of the endowment, then it is valid; accordingly a transfer *inter vivos* of a turn of worship to a co-sebait is held to be justified in the special circumstances of the case, (*Nirad* v. *Siba*, I.L.R., 36 C., 975 = 13 W.N., 1084), and a family arrangement for conducting the worship by turns, as well as the delegation of their turns by some to other co-sebaits, is held valid, the scheme being one made for the due execution of the functions of the office, by the concurrence of all the interested parties competent to effect it: *Ram* v. *Muru*, I.L.R., 29 M., 283. On the other hand the office of sebait has been held inalienable by Will, in the absence of any local usage, family custom, necessity, or clear benefit, (*Raj* v. *Gop*, 35 C., 226 = 12 W.N., 323), or by transfer *inter vivos*, even to a co-sebait or to one next in succession: *Govinda* v. *Devendra*, 12 W.N., 98.

Limitation.—When an alienation of the office or of the endowed property has been illegally made, it may be set aside by a co-*Sebayet* or by one entitled to become the *Sebayet* after the present trustee. The successive trustees form a continuing representation of the God's property (9 L.J., 597), but they have not successive life-estates, so that no new cause of action can arise after the death of the vendor. Article 124 of the

Limitation Act applies; there is no distinction between the office and the property: 27 I.A., 69. Nor is a person precluded from raising the queston that the priestly office and its emoluments are inalienable, because he had transferred the same: 17 W.R., 41; 1 W.N., 493.

As regards limitation, it should be considered whether Section 7 of the Limitation Act is not applicable to a suit to set aside an improper alienation, by a *Sebayet* of the property belonging to a Hindu God. A Deity is regarded as a juridical person for the purpose of holding property of which the *Sebayet* is only a manager; the relation between him and the God is not that of trustee and beneficiary. As the God is incapable of managing his property, he should be deemed a perpetual minor for the purpose of limitation.

It has, however, been held by the Judicial Committee that the right of management being vested in the Sebayet, his minority would save limitation: 31 I.A., 203.

A suit by a Mohunt to recover possession of endowed property from a person to whom a permanent Mokrari Pottah had been granted by his predecessor, is not governed by Art. 134 of Sch. ii of the Limitation Act, the words "purchased for a valuable consideration" being held to mean absolute transfer of ownership from the vendor to the purchaser for a price, but is governed by Section 10 of the Act: (14 W.N., 1).

Endowment irrevocable.—When the donor of an endowment has completely divested himself of the property dedicated, he cannot revoke the trust or derive any benefit therefrom, except what has been reserved: 18 W.R., 472: 23 W.R., 76.

If the object of an endowment fails, and the funds cannot be applied to the original purpose, then according to the doctrine of *cy pres*, they are to be appropriated to an object of a similar character.

CHAPTER XV.

IMPARTIBLE ESTATES.

१ । ज्येष्ठ एव तु गृह्णीयात् पित्र्यं धनम् अशेषतः ।
शेषास्तम् उपजीवेयु-र्यथैव पितरं तथा ॥ मनुः, ९, १०५ ।

1. Or the eldest brother alone may take the paternal wealth in its entirely; and the others may live under him, as they lived under their father.—Manu, 9. 105.

२ । सदृशस्त्रीषु जातानां पुत्राणाम् अविशेषतः ।
न मातृतो ज्यैष्ठ्यम् अस्ति जन्मतो ज्यैष्ठ्यम् उच्यते ॥ मनुः, ९, १२५ ।

2. As between sons born of wives equal in class, there being no ground for distinction, there can be no seniority in right of the mother; but the seniority is ordained to be according to the birth.—Manu, 9, 125.

Origin of impartible estates. -There are many valuable estates consisting of large tracts of land, the succession to which is not governed by the ordinary law of inheritance, prevalent in the locality, but is regulated by the custom of primogeniture, according to which they are descendible to, and held by, a single member of the family at a time, the other members being entitled to maintenance only.

These impartible estates appear to have originated in three different ways namely : –

(1) Most of them appear to have orgiginally been *Rajes* or principalities, or territories of independent chiefs or feudatories exercising powers of an autocrat, who have gradually been in course of time, reduced by the paramount power, to the position of ordinary Zemindars.

(2) In some of them, a share of the rents and profits of the landed property formed the emoluments of public hereditary offices which could be held by only a single member of the family, and so was descendible to a single heir by primogeniture.

(3) While the rest appear to have owed their origin to family arrangements followed up in practice for many generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of the whole family, by a single member at a time, in a certain order of succession, the other members being entitled to maintenance only without any power of interference with the management: Text No. 1.

According to the ancient law of the country, the ruling power was entitled to a certain share of the produce yielded by every bigha of cultivated land; for the purpose of convenience in collecting the same, the country was divided into a large number of fiscal districts, each of which was under the charge of an officer of government, whose principal duty was, to collect the king's share of the produce or the land-revenue or the land-tax, as well as other taxes levied on tradesmen and the like. Like other occupations in India, the office of the tax-collectors became hereditary, and their remuneration consisted of a certain percentage of the net collections made by them. In course of time, the value of the king's share of the produce collected in each of the fiscal districts became well-known, and these revenue-officers were required to pay a certain amount of money, being the approximate value of the king's share after deducting therefrom the collection charges and their own remuneration; which amount was liable to variation owing to circumstances justifying an increase or diminution thereof, and was fixed upon an estimate of the aggregate of the rents payable by the ryots or tenants, of which, after deducting the expenses of collection, ten-elevenths were usually considered as the right of the Government, and the remaining one-eleventh as the remuneration of the Malguzar or Revenue-Collector.

By the Permanent Settlement of 1793, these hereditary tax-Collectors in Bengal, Behar, and Orissa or Midnapur, were converted into proprietors of the fiscal districts or Pergunnahs; in other words, the British Administration transferred its right to the king's share of the produce of the lands in the fiscal districts, to the hereditary tax-collectors generally known by the name of Zemindars in Bengal, subject to the condition of paying to the Government a certain amount of annual land-revenue declared fixed and unalterable for ever.

According to a custom originating in considerations of financial convenience, these hereditary offices were impartible and descendible by primogeniture to the eldest sons of the holders thereof, after their death. But their character was changed by the Permanent Settlement, and they were converted from offices into tenures in land.

While concluding the Permanent Settlement with the Zemindars, and thereby conferring proprietory right on them in respect of lands settled with them in perpetuity, the British Administration thought it desirable to take away the character of impartibility of their original status in relation to the lands,

of which they had been Malgúzars or tax-gatherers only, and not proprietors.

In order that there might not be any doubt on the subject, Regulation XI of 1793 A.D. was passed, which refers to the previous custom of impartibility, and declares that, notwithstanding the same, these newly formed estates shall be descendible like other descriptions of property, to all the heirs of the deceased proprietor, according to the Hindu or Mahomedan law of inheritance, and shall be liable to partition when devolving on two or more heirs.

Subsequently in the year 1800 A.D., an exception to the above rule was declared by Regulation X of that year, the Preamble of which runs as follows,—"By Regulation XI of 1793, the estates of proprietors of land dying intestate are declared liable to be divided among heirs of the deceased, agreeably to the Hindu or Mahomedan laws. A custom, however, having been found to prevail in the jungle mehals of Midnapoor and other districts, by which the succession to landed estates invariably devolves to a single heir without the division of the property, and this custom having been long established, and being founded in certain circumstances of local convenience which still exist, the Governor-General in Council has enacted the following rule, to be in force in the provinces of Bengal, Behar and Orissa, from the date of its promulgation."

The rule enacted is, that the Regulation XI of 1793 shall not be considered to supersede or affect any established usage obtaining in the said places, by which succession to landed estates has been considered to devolve to a single heir, to the exclusion of other heirs of the deceased ; and in the Mehals in question the local custom shall be continued in full force, and the Courts of Justice be guided by it in the decision of all claims to the inheritance of the estates.

Similar in effect is Regulation XI of 1816, which declared that certain tributary estates in the district of Cuttack shall not be subject to partition according to the Hindu law, but shall descend entire and undivided to a single heir according to local and family usage.

It should be observed that it is difficult now to distinguish between the different kinds of impartible estates as described above, more especially between the principalities and the Zemindaries, by reason of the holders of the latter, who are titular Rajas or Mahárájás having assumed the insignia of royalty.

But still there are good grounds for considering that the

impartible estates in the Jharkhand or jungle mehals of Chota-Nagpur and the neighbouring districts, and the Gurjat states of Orissa, were originally principalities or small states or territories of independent chiefs and feudatories, who were real Rajas, and at one time used to exercise the powers of an autocrat within their respective dominions; some of them are still permitted to enjoy their former powers in certain matters, such as the Raja of Singbhum.

In the jungle mehals there is a custom, according to which the Raja's sons have different titles in the order of their seniority; the eldest son is called the Jubaraj, the second Hekim, the third Bara-Thakur, the fourth Kumar or Cowar, the fifth Musib, and the rest Babu—a term which is now the usual compellation in Bengali for respectable men.

The holders of these estates follow the practice of real Rájás or kings in a few matters; for instance, the Raja is not subject to the rule of impurity or mourning even on the death of his parents (Manu V, 95-97), nor has he to perform the *sráddha* and the like religious ceremoney, which it is the duty of the Hekim, or a priest appointed in that behalf, to do.

Onus as to impartibility.—When there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance, according to which the estate is to be held by a single member, and, as such, is not liable to partition: *Zemindar of Merangi v. Sri Raja*, 18 I.A., 45, = I.L.R., 14 M., 237; *Srimantu* v. *Srimantu*, 17 I.A., 134 = I.L.R., 13 M., 406.

The Zemindary of *Hunsapur* or the *Hutwa Raj* was, like similar extensive Zemindaries, impartible and descendible to the eldest male heir, for many generations before the Company's accession to the Dewany, when in consequence of the refusal of the holder thereof, to acknowledge the *quasi*-sovereign rights of the Company, he was driven to the jungles, and the Zemindary was confiscated in 1770, but subsequently at the time of the Decennial Settlement in 1790, the Zemindary was granted to a member of the junior branch of the same family, as a matter of favour: it was held that in the absence of any express intention of the grantor to alter the nature of the tenure, it must be presumed, according to the policy of the Decennial Settlement, that the subject of the grant was the old Zemindary with all its incidents including impartibility, and that the transaction was not so much the creation of a new tenure, as the change of the

tenant by the exercise of a *vis major*: *Babu Beer Pertab Sahee* v. *Maharaja Rajender Pertab Sahee*, 12 M.I.A., 1.

It was further held in this case that Regulation X of 1793 does not affect the descent of the large Zemindaries held as *Raj*, or subject to *Kulachar* or family custom. It was also held that the title of *Rajah* is not absolutely essential to the tenure of an estate as *Raj* or impartible.

In the case of *Sardar Muhammad* v. *Nawab Ghulam*, 30 I.A., 190, it has been held that the effect of the British settlement was not to create a fresh estate, but to continue to the chief the proprietorship of the villages with its previous incidents of impartibility and succession by special family custom in the line of primogeniture.

In the case of *Chowdhry Chintamun* v. *Mt. Nowlukho Kunwari* (2 I.A., 263,) it is laid down that a custom of descent according to the law of primogeniture may exist by *Kulachar* although the estate may not be what is technically known either as a *Raj* in northern India or a *Polliam* in Deccan. See also *Shyamanand* v. *Ramkanta*, I.L.R., 32 C., 6.

In some other cases, however, it has been held that there was nothing in the grant made by Government or in the circumstances attending it, showing that it was intended to create an impartible Zemindary, or to restore an old tenure with impartibility attached: *Raja Venkata* v. *Court of wards*, 7 I.A., 38; *Zemindar of Merangi* v. *Sri Raja*, 18 I.A., 45 = 14 M., 237.

The Zemindary of Nuzvid which seems to have been an impartible estate, was divided by the Government into two Zemindaries after confiscation, and the smaller one was granted to a junior member of the family, who had not held any estate descendible by primogeniture, it was held that it did not become an impartible estate: I.L.R., 2 M., 128. The ancient *Betia raj* also was divided after confiscation into two portions, the smaller one was granted to the collaterals entitled to maintenance, and the previous Raja's heir was re-instated to the larger portion constituting the present Betia Raj. It has been held that the new *Raj* became the separate self-acquired property of the grantee, though with the incidents of the tenure of the old estate as an impartible *Raj*, to which the last holder's widows were rightful heirs, there being neither his male issue nor collaterals descended from the grantee, nor proof of exclusion of females from succession; nor is the widow's succession inconsistent with the custom of impartibility: 29 I.A., 178.

Evidence of family usage, by which the eldest son, successively

for eight generations, succeeded to a Zemindary to the exclusion of other sons, was held to be sufficient to establish it to be impartible : *Rawut Urjun Sing* v. *Rawut Ghunsim Sing*, 5 M.I.A., 169.

But the mere fact that an estate has not been partitioned for six or seven generations, will not make it impartible where previous partition is proved : *Thakur Durriao Sing* v. *Thakur Davi Sing*. 1 I.A., 1 = 13 B.L.R., 165.

A special usage modifying the ordinary law of succession must be ancient and invariable, and must be established to be so by clear and unambiguous evidence : *Rama* v. *Siva*, 14 M.I.A., 570 = 17 W.R., 553 ; see also 15 W.R., P.C., 47 ; 16 W.R., 179 ; *Hur* v. *Sheo*, 3 I.A., 259 = 26 W.R, 55.

In a recent case in which, whenever the holder of the estate died leaving more than one son, there was litigation challenging the eldest son's right, which invariably ended in a compromise whereby the junior member got a share far in excess of what he would have got, had the estate been impartible,—it has been held that the evidence failed to give the character of certainty to the alleged custom of primogeniture : *Rama* v. *Shama*, 36 I.A., 49 = 36 C., 590. The history of this family showed that under both the Mogul and the Maharatta rule, the office of Chaudhuri was held by one member of the family, who held *nankar* lands as part of his remuneration. But though the office was generally heritable, its grant was revocable and the succession to it was not necessarily heritable, so it did not afford clear and unambiguous evidence of a custom of succession to land. The term *Chaudhuri* or *Chatur-dhurin* means holder of four-fold burden or duty, and implies an officer to whom four duties were entrusted, namely, Military, Police, Judicial and Fiscal, under native rule : in fact, the predecessors of the Zemindars were not only collectors of revenue, but also administrators of civil justice, and superintendents of police, and had to render, whenever required, military service to the ruling power, for which they had to maintain certain number of troops, both cavalry and infantry ; but under the British Administration, they were at first relieved of the last two duties, and at about the time of Decennial Settlement they were exonerated from the duty of superintending the police, as well as that of collecting revenue derived from other sources than land.

Impartibility and Jointness.—Although the impartible estates cannot be held by more than one person, and is possessed exclusively by one member at a time, yet they may be the joint

property of the members of a joint family governed by the Mitákshará, so as to pass by survivorship.

Thus, it is observed by the Judicial Committee,—"A *Polliam* is in the nature of a Raj; it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the *Polligar*, the other members of the family being entitled to a maintenance or allowance out of the estate." (*Naragunty* v. *Vengama*, 9 M.I.A., 66, 88). Similarly it is observed by their Lordships in the *Shivagunga* case,—"Hence if the *Zemindar*, at the time of his death and his nephews were members of an undivided Hindu family, and the *Zemindari*, though impartible was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the *Zemindar* at the time of his death, was separate in estate from his brother's family, the *Zemindary* ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to his nephew, following the course of succession which the law prescribes for seperate estates. These propositions are incontestable:" 9 M.I.A., 539, 589.

It should be observed that where property is held in coparcentary, by a joint family under the Mitákshará, there are ordinarily three rights vested in the coparceners, namely, the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment of the members other than the holder thereof, is reduced to the right of maintenance receivable from the estate by virtue of the co-ownership, and the right of partition is, from the nature of the property incapable of existence. But the right of survivorship founded on co-ownership, is not inconsistent with the nature of the property, and therefore remains unaffected.

The holder of a joint but impartible estate, is a co-owner though entitled to the exclusive possession, and as such he appears to be under two duties to his co-parceners in virtue of their co-ownership, namely, the duty to provide them with maintenance, and the duty to preserve the *corpus* of the estate, which he alone, being one of several joint-tenants, is incompetent to alienate except for justifiable causes:—*Naraganti* v. *Venkata*, I.L.R., 4 M., 250; *Gopal* v. *Raghunath*, I L.R., 32 C., 158.

In this respect there appears to be a conflict between the different decisions of the Judicial Committee.

In the Tipperah case of *Neel Kisto Deb* v. *Beer Chunder Thakur*, 12 M.I.A., 540, the Lords of the Judicial Committee observe as follows:—"Still when a *Raj* is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is, the title to the Throne and the Royal-lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands, and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir."

This was a Bengal case governed by the Dáyabhága, and so it is no authority in a case governed by the Mitákshará, according to which a son living jointly with his father, inherits even the latter's self-acquired property by survivorship and not by inheritance. It would, no doubt, be a contradiction in terms, to call a separate ownership, at once sole and joint ownership; but it would be begging the question to call the right of a single person to hold an impartible estate, a separate ownership.

But it is not at all inconsistent with the principles of Hindu law that the right of the other members to maintenance out of the estate, should be referred to their joint ownership in the impartible estate; the inequality and disproportion between what is received by the holder of the estate, and what is paid to each of the other members for his maintenance, cannot and does not affect their co-ownership, as similar inequality obtains even in other circumstances. For instance, take the case of a joint family consisting of eleven first cousins, of whom one is the son of one brother, and ten are the sons of another brother; here, on partition, the former would be entitled to half the estate, and each of the others to one-twentieth, yet there are co-ownership and survivorship among them. The excess of what the holder of the estate gets over what any other member receives, is designed for the preservation of the dignity of the family and its head as well as for the improvement of the estate.

The argument that a son does not acquire a right by birth to an impartible estate in the possession of the father, because the former cannot demand partition, is contrary to Hindu law, which recognizes co-ownership in property, the only ordinary legal incident of which, is, the right to receive maintenance from that property. And this co-ownership, which may be called imperfect or subordinate, is recognized by Hindu law to account for the right of maintenance, which the wife and a son enjoy in the property of the husband and the father respectively. The ignoring of the doctrine of Hindu law, has led to the serious misconception, namely, the denial of proprietary right by reason of the want of power to demand partition. To an English lawyer, the traditional popular view of *joint* but *impartible* estates, taken by the Privy Council in the earlier cases (9 M., I.A., 88 and 589), may appear inconsistent, if he does not take into consideration the conception of ownership in Hindu law with which the same is perfectly consistent even if the holder's power of alienating the impartible estate be recognised, in the same way as the father's power of alienation over his self-acquired property of which his son is co-owner: see *ante* p. 208.

Accordingly in other cases the Privy Council have given effect to survivorship:—*Naragunty* v. *Vengama*, 9 M.I.A., 66; *Chintamun Sing* v. *Mt. Nowlukho Konwari*, 2 I.A., 263 = I.L.R., 1 C., 153; *Raja Rup Sing* v. *Rani Baisni*, 11 I.A., 149 = I.L.R., 7 A., 1; *Maharani Hira Nath Koer* v. *Baboo Burm Narayan Sing*, B.L.R., 274 = 17 W.R., 316; *Raja Jogendra Bhupati* v. *Nityanand*, 17 I.A., 128 = I.L.R., 18 C., 151; *Kachi* v. *Kachi*, 32 I.A., 261.

When a member of the family gets maintenance from the holder of an impartible estate out of its income, or enjoys the rents and profits of any land granted in lieu of maintenance out of the estate, he is deemed to be under Hindu law, joint in estate with the holder, so as to be entitled to get the estate by survivorship.

But the true principles of Hindu law, enunciated by the Judicial Committee in the earlier cases, upon which succession by survivorship depends, and to which effect is given in the above rulings, are often ignored; as for instance, it has been held in a recent case that the interest of a member of the holder's family, during his life is only a *spes successionis*, which is not subject of partition, and that there cannot be separation between him and the holder: *Lalitteswar* v. *Rameswar*, I.L.R., 36 C., 481. But it should be noticed that according to this view, it

is absolutely impossible to assign any cogent argument to support the exclusion of the holder's widow, daughter and daughter's son, by the male members of the family.

But, apparently inconsistent with, and subversive of, the above principle, is the doctrine enunciated by the Privy Council, namely, that a son does not acquire by birth such right to an impartible ancestral estate in possession of the father, and does not become such co-owner, as to be entitled to prevent an alienation by the latter, of an important and valuable portion of the estate:—*Sartaj Kuari* v. *Deoraj Kuari*, I.L.R., 10 A., 272 = 15 I.A., 51; 26 I.A., 83 = I.L.R., 22 M., 383.

The effect of these decisions is that when an estate is impartble, the sons of the present holder have no *locus standi* to question the father's dispositions of the estate: I.L.R., 22 M., 538.

But it should be observed that there cannot be survivorship without co-ownership and joint tenancy: and one co-owner alone is not competent to alienate that which is the subject of joint tenancy and co-ownership. The correct view seems to be, that the holder of the estate has no more interest in the estate than the other members, but by virtue of his position as the holder of the estate, he has full control over the surplus income for his life.

It should, however be specially noticed that the view that the members of a Mitákshará joint-family, other than the holder of an impartible eatate, are co-owners with him of that estate,—though greatly modified is not exploded by the recent decisions of the Privy Council, recognising the holder's power of alienation in the absence of special family custom to the contrary; for, then the impartible estate would have the same incidents as the father's self-acquired property, both being *joint* though *alienable* by the predominant co-parcener.

Holders rights and alienability.—The alienation of a portion of an impartible estate, by the holder thereof, would be contrary to the very nature and character of the tenure of such property; for, if such transfer were allowed, it could not be effectuated except by partitioning that which is *ex hypothesi* impartible. If therefore it cannot be alienated in part, it would follow *a fartiori* that it cannot be alienated in its entirety. Inalienability, therefore, appears to follow as the necessary logical consequence of impartibility. The policy of the law, or of the grant, or of the family arrangement, by which an estate was originally made impartible, cannot but be taken to intend the continuance of the *corpus* of the property intact,

in the hands of the successive holders thereof. The object of excluding all the other members of the family from participation in the estate, cannot reasonably be taken to be any other than its preservation in entirety without diminution. To prevent the ordinary law of inheritance to take its course. by depriving all the other heirs of equal enjoyment, for the purpose of making the estate indivisible, and at the same time to allow the holder to destroy or divide the property according to his pleasure, and so to undo the whole scheme, would be two most incongruous and inconsistent things, that cannot reasonably be reconciled. The absolute power of alienation in the holder of such property, is not only contrary to the spirit of Hindu law, according to which immoveable property cannot, as a general rule, be alienated except for justifiable especial causes, but it is also opposed to the doctrine of survivorship held to be applicable to these estates, in certain circumstances.

Hence the view taken by the Madras High Court with respect to the position of the holder of the estate, in relation to it, appears to be in accordance with the Mitákshará law, namely, that an ancestral impartible estate is the subject of co-ownership of all the brethern like ordinary property, and the holder is bound to preserve the *corpus* of the estate; and that the position of the holder of an impartible *Raj* is similar to that of a father with respect to ancestral property under the Mitákshará; *Naraganti* v. *Venkata*, I.L.R., 4 M., 250; *Gavuri* v. *Raman*, 9 M.H.C., 93. The Bengal High Court also took the same view in the case of *Rajah Ràm Nariain* v. *Pertum*, 20 W R. 189, and held that all the incidents of joint property under the general Mitáksahrá law must still remain, except in so far as the same is controlled by the special custom, which went to show only that the property was not partible.

The utmost right of alienation, therefore, which the holder may be competent to exercise over impartible estate, is the transfer of his life-interest in the estate, which consists of the privilege of appropriating its income during his life, after meeting all the legal liabilities attached to the same: 31 I.A., 1. The savings, and any property which he may acquire therewith, may be said to become his self-acquired and separate property, over which he may exercise absolute right, and which will pass on his death to his heirs under the ordinary law; *Kotta* v. *Bangari*, I.L.R., 3 M., 145. Although the same may also be fairly contended to become accretions to the estate as in the

case of accumulations and acquisitions made by a Hindu widow in Bengal,—and has been held to be so, in *Lakshmipathi* v. *Kandasami*, I.L.R., 16 M., 54, and *Ramasami* v. *Sundara*, I.L.R., 17 M., 422.

The principle enunciated in these cases, with respect to acquisitions of immoveable property, made by the holder with the savings of the income, is analogous to that relating to similar purchases by a widow. It has been held to be a question of intention on the part of the Zemindar, whether he treated the accessions as his private property, or as an increment to the estate. A distinction, however, is drawn between lands situated within the estate, and those that are not so: the former are presumed in the above cases to be intended to be appurtenant to the estate, in the absence of any disposition *inter vivos* or testamentary. But it is held by the highest tribunal that there must be in the facts adequate grounds for holding that the late incumbent intended to incorporate the acquisitions with the ancestral estate: *Srimati Rani Parbati* v. *Jagadish*, 29 I.A., 82 = 29 C., 433.

But it is asserted, as I have already told you, that a son does not acquire a right by birth to an ancestral impartible estate held by the father, because he cannot demand its partition; and from this it is concluded that the holder of the estate is competent to alienate it, unless there be a custom against alienation, proved to exist: *Sartaj Kuari* v. *Deoraj Kuari*, I.L.R., 10 A., 272; *Raja Udaya* v. *Jadab Lal*, I.L.R., 8 C., 199; *Thakur Kapil* v. *Govt. of Bengal*, 22 W.R., 17; *Beresford* v. *Ramasubba*, I.L.R., 13 M., 197; *Narain* v. *Lokenath*, I.L.R., 7 C., 461; *Ram* v. *Tekait*, 6 W.N., 879.

It is worthy of special remark, that the question relating to the holder's power of alienation arose, in most cases, in connection with permanent grants of portions of the estate, made either to the junior members for maintenance, or to the servants holding a hereditary office under the *Raj*, in lieu of salary: 5 M.I.A., 82; 22 W.R., 17; I.L.R., 8 C., 199; I.L.R., 7 C., 461. These grants appear to be resumable in default of the grantee's male descendants in the male line, who are entitled to maintenance, or competent to perform the duties of the office, respectively; so these are never intended to be absolute alienations.* Such grants are within the competency of the holder with restricted power of alienation. These, however, are sought to be justified by the assumption of unlimited power.

* M. L. 765.

But it should be observed that the right to call for partition, is only one of the incidents of joint ownership; hence the inference of absence of co-ownership, from the absence of the right to partition, does not appear to be logically correct. Besides, this is contrary to Hindu law which recognises co-ownership of persons who are not, however, on that account, entitled to call for partition; for instance, take the case of the father's wife who is a co-owner, but who is not entitled to demand partition, but who is nevertheless entitled to maintenance by reason of her co-ownership, and is also entitled, by reason of her co-ownership, to a share when partition does, at the instance of a male co-parcener, actually take place; for, partition cannot create any new right, it is merely an adjustment, into specific portions of the joint property, of divers existing rights over the whole thereof. It should moreover be remarked, that unless the right of sons by birth be recognised, there cannot be survivorship which has been held to apply to impartible estates. The two doctrines, namely, recognition of devolution by survivorship and denial of right by birth—are irreconcilable. But the recognition of the holder's power of alienation is not irreconcilable with his son's acquisition of right by birth. The difficulty must continue until it is set at rest by the Judicial Committee.

Recent pronouncement by the Judicial Committee.—In many earlier cases it had been declared by the Privy Council, in language as clear as possible that an impartible estate "*may belong to an undivided family*" and may be "*part of the common family property,*" and accordingly it was believed not only by laymen but also by judges and lawyers in this country that the position of the holder of an impartible estate, was the same as that of the manager of joint family property, and that impartibility and inalienability were incidents of the tenure of the property. But it has now been held by the Judicial Committee in recent cases that an impartible estate is not really the joint property of the family, but that the same is to be deemed joint only for the purpose of ascertaining the heir and successor of the last holder, and that impartibility does not mean that the property is to be preserved entire and undiminished, but it merely means that the estate is not divisible among the heirs of the holder who is absolute owner of the estate, and as such is competent to alienate it by deed or will in any manner he pleases, unless the estate be proved to be inalienable by special family custom; 15 I.A., 54; 26

I.A., 83. The last case, in which a devise by the holder of an impartible estate to his illegitimate son was upheld, seems to have come as a surprise on the people of Madras, and a temporary local Act was passed declaring all impartible estates to be inalienable. It is difficult to say what evidence would amount to sufficient proof of such family custom. If tradition and popular belief be accepted as such proof, there is superabundance of the same against alienability of impartible estates.

Legislation, law, custom and popular ideas.—The temporary Act has been replaced by a permanent enactment in Madras, namely, "The Madras Impartible Estates Act" No. II of 1904. It is founded on the view taken by the Judicial Committee in the earlier cases, of the nature and character of such estates. It declares (section 4) that—"The proprietor of an impartible estate shall be incapable of alienating or binding by his debts, such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other co-parceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other co-parceners independently of their consent."

The law herein laid down is the necessary logical consequence of the description of impartible estates given by the Judicial Committee, in many cases, namely,—(9 M.I.A., 86) "A *Polliam* is in the nature of a *Raj*; it *may belong to an undivided family*, but it is not the subject of partition, it can be held by only one member of the family at a time, the other members being entitled to a maintenance or allowance out of the estate":—(9 M.I.A., 589) "the *Zemindari*, though *impartible*, was *part of the common family property*:—(13 M.I.A., 339) "the estate was in its inception *part of the common family property*, though *impartible*,": and the like.

The law as laid down in the Madras Act appears to be perfectly consistent with the Mitákshará law and also with recorded customs of such estates, where available. For instance, the *Panchis Sawal* (or collection of answers to *twenty-five questions* put to the holders of the *rajes* called *gurs* and *killas*) which embodies the customs of certain impartible estates of Orissa, shows that a Raja cannot alienate the *raj* when there are *principal heirs*: see questions and answers, xvi and xvii. By the expression *principal heirs* (= प्रधान उत्तराधिकारी) are indicated

the co-parceners or the male members of the family taking by survivorship: *Gopal* v. *Raghunath*, I.L.R., 32 C., 158.

According to popular notion, an impartible estate is one that is to be preserved entire, undiminished and undivided: it is deemed impartible in the sense of being incapable of severance into parts, and hence it is not liable to be held by more than one person at a time. It is not deemed impartible on account of being incapable of inheritance by more than one heir. On the contrary, it is believed to be the joint property of all the co-parceners, each of whom acquired a right by birth to it, in the same way as to ordinary property; but not being liable to partition, it is held at a time by one member as representing the whole family, the other members being entitled to their necessary expenses out of the estate, by virtue of their right by birth; and the surplus left after defraying such expenses, is at the disposal of the holder of the estate during his life, in order to enable him to maintain the position and dignity of the family.

Inalienability, therefore, follows as a necessary logical consequence of impartibility, the holder's position being that of a life-long manager and head of the family to which the estate belongs.

In a recent Madras case (*Abdul Aziz* v. *Appayasami*, 31 I.A., 1, 9), it has been held by the Judicial Committee, that it was the accepted law before 1889 when *Sartaj Kuari's* case was decided, that the holder of an impartible estate, who was himself a member of an undivided family, could not alienate or incumber the corpus of the estate so as to bind his co-parceners, except for justifiable especial causes, and that therefore an auction-purchaser in execution of a decree, of the holder's right, title and interest became entitled only to the life-interest of the holder who was at the time of sale, understood to have no more than such interest in the impartible estate, which the Court must be deemed to have intended to sell, and the purchaser to buy.

Maintenance of Junior Members, and Grants.—An impartible estate appears to be the hereditary source of maintenance of all the members of the family to which it belongs though it is exclusively held by a single member at a time.

I have already said that an impartible estate is the subject of joint ownership and survivorship under the Mitákshará law, and that the right of sons does accrue to such an estate in the hands of the father in the same manner as to his self-acquired

or ancestral property, from the moment of their birth, although it does not entitle them to call for its partition.

The right of maintenance is, therefore, claimable by the junior members and their descendants in the male line, by virtue of their co-ownership in the estate. The *Babuana* grants of land to the junior members of the Durbhanga *Raj* family are impartible and descendible to the eldest male heirs of the grantee who holds them for the maintenance of the family consisting of the male descendants of the grantee, on failure of whom they revert to the grantor or the holder of the *raj* for the time being: *Durgadut* v. *Maharaja*, 36 I.A., 176 = I.L.R., 36 C., 943 = 13 W.N., 1013. But see *contra, Lalit* v. *Bhab*, 12 W.N., 958.

The right of maintenance must according to Hindu law be referred to this co-ownership, of which this right and survivorship are the legal incidents. The Judicial Committee observes,—"These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a *Raj*, or impartible estate, in favour of the junior members of the family; who, but for the impartibility of the estate would be co-parceners with him:" 13 M.I.A., 333, 340.

Maintenance may be given in cash; or grants of land appertaining to the estate, may be made in lieu of maintenance, the rents and profits of which, are enjoyed by the grantee and his heirs male in the male line: *Lakshmi* v. *Durga*, 20 I.A., 9 = I.L.R., 16 M., 268; I.L.R., 16 M., 54.

In determining the amount of maintenance to be awarded to a junior member, the principle upon which maintenance is allowed to a Hindu widow should be applied: regard should be had to the income of the *raj* and other sources of income if any, and to the claims of other members of the family, as well as to the expenditure necessary for maintaining the position and dignity of the holder as a *raja*: I.L.R., 21 A., 232.

Wrongful withholding of maintenance and unwillingness to pay the same will entitle the claimant to a decree for the arrears within the period of limitation: I.L.R., 24 M., 147, 153 = 27 I.A., 151, 157.

The *putra-pautradik* grants in Chota-Nagpur appear to have originated in maintenance grants to junior members; they are enjoyed by the grantees and their male descendants in the male line, and their widows. They do not pass by inheritance to daughters or any heir belonging to a different *gotra* or family: 22 W.R., 17; I.L.R., 7 C., 461; 31 C., 561. But these become

resumable by the *raja* or holder of the estate, on failure of heirs male and their widows; the lands that are subjects of these grants, are not absolutely severed from the estate, there being the reversion in favour of the holder. The grants of land by way of maintenance should, having regard to the real character of the impartible estates, be deemed, not as transfers of ownership, but as assignments of only the rents and profits to be enjoyed by the junior member and his male issue who are entitled to get maintenance out of the estates.

This view is in accordance with the Mitákshará law which recognizes acquisition of ownership by birth, in the property of the father and other paternal ancestors, the lowest but invariable incidents of which are the right to maintenance and survivorship.

But these grants, providing as they do for the defeasance of the interest and for its reversion, in the event of indefinite failure of male issue, contravene the rule against perpetuity as enunciated in the *Tagore* case, and would therefore be inoperative (*Sri Raja* v. *Sri Raja*, I.L.R., 17 M., 150), unless their validity can be maintained on the strength of custom: 31 C., 561.

According to the Bengal School, however, ownership is not acquired by birth; sons are not therefore co-owners of their father in respect of the paternal or ancestral property; but their right to maintenance out of such property is expressly declared, not as an incident of co-ownership, but as an incident of their status of being male issue of the paternal ancestors. There cannot be joint ownership and survivorship under the Dáyabhága; hence the question as to the right of remoter descendants in the junior lines must depend on custom.

In a case of Pachete *Raj* which appears to be governed by the Dáyabhága, it has been held that there is no law or custom, which entitles any member of the family, other than the son or daughter of a holder of the estate to receive maintenance: *Nilmony* v. *Hingoo*, I.L.R., 5 C., 256. It was, however, in evidence in this case, that the other members did, as a matter of fact, receive maintenance allowances, but this was held referable rather to the favour of the Raja, than to any right in the recipients.

In the case of Patkum *Raj*, it has been held that maintenance grants are resumable by the *Raja* on the death of the grantees: *Raja Wooday* v. *Mukund*, 22 W.R., 225. There was an admission on the part of the defendant as to the grant being resumable. The learned judges seem to have been

influenced by what they observe in the following passage,—"The nature of a maintenance grant is obviously that whilst it makes for the immediate members of the family a suitable provision, it prevents, by means of the exercise of the right of resumption, the *Zemindari* from being completely swallowed up by the continual demand upon it."

But it should at the same time be borne in mind that the descendants of the original grantees also require maintenance; and there is no reasonable legal ground for drawing any distinction between the original grantees and their descendants with respect to their right to maintenance. As regards the apprehension of the estate being swallowed up, it may be remarked, that it is not unreasonable to expect that the holder should make provisions for the maintenance of all the members, out of the large income of the estate. It seems to be contrary to the spirit of the Hindu law as well as to Hindu feelings, that the remoter descendants of the junior branches should be deprived of this source of their maintenance, whilst the holder of the estate should be permitted to waste its income and even dissipate the estate itself by alienations for satisfying his personal wants of an extravagant character.

It has, however, been held that the holder of the estate is competent to make permanent hereditary grants for the maintenance of the junior members and their descendants: *Uday* v. *Jaduh*, I.L.R., 5 C., 113 = I.L.R., 8 C., 199 (P.C.).

The validity of these permanent grants, is maintained on the ground, that the holder has the power to alienate the impartible estate according to his pleasure, and not on the ground that the grantee's descendants are entitled to have maintenance out of the estate; as they undoubtedly would have according to the Mitákshará. There cannot be any doubt that the holders of impartible estates, while making provision for the maintenance of their younger sons, will make the grants in perpetuity, when the view taken by our Courts in some cases, is known to them, namely, (1) that mere maintenance grants may be resumed by his successor, but (2) that he is competent to make the grants permanent and heritable in perpetuity.

It should, however, be observed that in those estates to which the right of junior members to succeed by survivorship is admitted to apply, the right of a junior member's descendants to maintenance, must follow as a necessary logical consequence from the doctrine of the Mitákshará, on which survivorship is based. But it seems that even in such a case a

grant has been presumed to have been for the grantee's life only: 32 I.A., 185=33 C., 203. Grants for maintenence, however, are not in all cases to be necessarily presumed to have been gifts of life-interest only: *Mohim* v. *Saraju*, 9 L.J., 576.

Maintenance grants, ancestral, impartible and alienable.—Grants of land made for the maintenance of the junior members and their male descendants only, and resumable on their default,—are really intended to create an interest in property restricted in its enjoyment to the grantees and their male issue personally, and such to be inalienable, coming as they do within the principle of clause (*d*), section 6 of the Transfer of Property Act. They may be deemed to be assignments of the usufruct of the lands, not intended to be transferable: (*Diwali* v. *Apaji*, I.L.R., 10 B., 342).

But our courts presume them to be alienable in the absence of proved family custom, or express term in the grant, to the contrary: (33 C., 1158; 36 C., 943; 12 W.N., 958). In some cases the grants are held to be impartible: (22 W.R., 17; 36 C., 943); while in others they are held divisible like other ancestral property: (12 W.N., 958; 33 C., 1158): they are held to become ancestral property in the hands of the grantee, though the estate is deemed as if self-acquired, for alienation by the grantor.

Primogeniture lineal and ordinary.—The succession to an impartible estate is regulated by the custom of primogeniture, or more properly speaking, the holder of the estate is to be selected according to the particular custom of primogeniture, obtaining in the same. In the majority of cases the lineal primogeniture appears to govern the succession to these estates, or to the office of the holder thereof, according as the holder is deemed to be the absolute master of the estate, or to be its sole manager.

By *lineal* primogeniture, preference is given to the senior *line*; and the succession goes to the nearest in degree in that *line*, although he may be remoter in degree to another member of the family, who belongs to a junior line; should there be more members than one in the nearest degree in the senior line, then the succession goes to the eldest among them; in default of any one in the senior line, it goes to a similar member in the next senior line; and so on.

But by *ordinary* primogeniture preference is given to *nearness in blood* irrespective of the *line*, and the succession goes to the *nearest in degree* although he may belong to the most *junior line*; should there be more than one in the same degree,

the succession goes to the eldest among them, to whichever line he may belong.

All estates to which survivorship applies, and in which the son of the last holder succeeds in preference to his younger brother and the like, must be taken to be governed by the rule of succession by *lineal* primogeniture.

In order to understand this position, let us take a case governed by the Mitáksharâ: suppose, *A* the holder of the estate dies leaving two sons *B* and *C*; *B* the senior son holds the estate, and *C* the junior gets only maintenance; *B* dies leaving a son *D*; then, *D* can get the estate in preference to *C*, if lineal primogeniture governs the succession.

For, the estate being one to which survivorship applies, is the subject of co-ownership of the members of the family, *viz.*, *A*, *B*, *C* and *D*, the last three acquired a right to the estate from the moment of their birth; in a joint family the rule of succession does not apply; although when a member of a joint family dies, it is ordinarily said that his undivided co-parcenary interest passes by survivorship to the surviving members of the family, yet this proposition is not at all accurate; what really happens is, that the deceased member's interest *lapses*; the right of each member extended to the whole property, from its inception, that right remains unaffected by the death of a co-parcener, which results only in the removal of a rival right of a similar character, co-existing in the property, and which event does not transmit any fresh right to any member: I.L.R., 5 B., 48, 62; I.L.R., 1 A., 105; I.L.R., 2 C., 379. Therefore *C* and *D* both had a right to the estate from before *B's* death which cannot confer any new right on *D*; then if *D* succeeds to the estate, he can do so, only by virtue of lineal primogeniture; otherwise, *C* being nearer in relation to all common ancestors commencing from *A*, would take, if *ordinary* primogeniture were applicable. Although by reason of the custom of primogeniture *B* alone held the estate, yet as regards co-ownership, his position was not higher than that of *C* or *D*, his brother and son respectively, and the latter can take only according to *lineal* primogeniture.

Accordingly it has been held by the Madras High Court that when the senior line becomes extinct by reason of there being no son or other male descendant of the last holder, and the right of exclusive possession of the impartible estate is to pass to a member of a different branch, then it devolves, in the absence of proof of special custom of descent, upon the nearest

co-parcener in the next senior line, and not on the co-parcener nearest in blood, *i.e.*, by lineal primogeniture and not by ordinary primogeniture :—*Naraganti* v. *Venkata*, I.L.R., 4 M., 250 ; *Kachi* v. *Kachi*, I.L.R., 24 M., 562, 609 *affirmed*, 32 I.A., 261, 265. This is the conclusion that legitimately follows from the Mitákshará doctrines, and is approved by the Judicial Committee.

The tendency of decisions, however, has been, to attach special importance to the last holder who is sometimes considered to form a fresh stock of descent. This may be perfectly true in the Bengal School. But there is a great and fundamental distinction in doctrine between the two schools in this respect, which may be illustrated by the following example : —

Suppose, the last holder dies without leaving male issue, but leaving his paternal grandfather's fifth and youngest brother and the said grandfather's second brother's son's son.

If the estate is to pass by succession to the nearest heir of the last holder, then it will go to the granduncle, in preference to the first cousin, in both the schools. But if the family be joint and governed by the Mitákshará, then the property is to pass by survivorship and not by succession ; and as regards survivorship, there cannot be any difference between the first cousin and the granduncle, the former represents his deceased grandfather the second granduncle of the last holder, both of them would be equally entitled by survivorship : I.L.R., 1 A., 105 ; I.L.R., 2 C., 379.

The heirship to the last holder is no test in such a case. If it be conceded that if there were a son left by the last holder he would take, then that would afford conclusive evidence of succession by *lineal* primogeniture, as has already been explained, and therefore the first cousin being in the next senior line, would take in preference to the granduncle : 29 I.A., 62.

But although the same conclusion would not follow from the Bengal doctrines, yet the succession of the eldest son of the last holder would follow, if the descent be governed by lineal primogeniture.

Where succession is governed by custom and not by the ordinary law, and the eldest son of the last holder succeeds according to it, it would be wrong to think that such succession has anything to do with heirship to the last holder ; for, the whole course of succession must be taken to be governed by custom irrespective of heirship to the last or any holder, although relationship to him is undoubtedly the most important

factor, but the same should be dissociated from the idea of heirship which does not apply.

It has already been observed that succession by primogeniture may be either lineal, that is, in the line of the eldest, or of the next eldest, and so on; or it may be ordinary, that is to say, it will not devolve on the eldest line, but on the eldest from amongst the nearest in degree. Now the question arises, nearest in relation to whom? In relation to the common ancestor of all the existing members of the family? Or in relation to the last holder?

Succession of the nearest to the *last* holder seems anomalous in principle. Suppose, the existing holder's eldest son dies in his lifetime leaving a son, and then the holder dies leaving the said grandson and other sons; then if the eldest among his nearest relations is to succeed, his second son would succeed to the exclusion of the pre-deceased eldest son's son. This kind of succession, however, is never found in practice. And it should moreover be borne in mind that according to ordinary Hindu law the right of representation is admitted amongst male descendants, and so the eldest son's son would stand in the shoes of his pre-deceased father for the purpose of inheritance from his grandfather. Hence it is difficult to say that he is remoter than his uncle.

Now, if we take the holder of the estate to be the manager of the joint family property, and suppose the impartibility to be the result of family arrangement, then we may expect the primogeniture applicable to such a case to be ordinary, in the sense of the succession of the eldest amongst the nearest from the *common* ancestor, and not from the *last* holder. For, according to the classificatory system of computation of degrees, as well as of rank and honour, the eldest amongst the nearest from the common ancestor, would be the object of respect payable by all the other members of the family, and therefore he is the proper person to step into the position of its head.

Hence ordinary primogeniture, *primâ facie* consistent with Hindu law and usage, appears to be the succession of the eldest amongst the nearest in relation to the *common* ancestor, and not in relation to the *last* holder.

If again the origin of an impartible estate be supposed to be a grant by the paramount power to a feudatory, then the course of succession to the *Raj* should likewise be presumed to have been settled at the time of the grant, in relation to the original grantee. Therefore, if ordinary primogeniture be the

rule of succession *originally* fixed, the nearness or otherwise of claimants was necessarily to be calculated in relation to the original grantee, who must have been the person principally considered at the time of the grant.

In practice, however, the nearest in relation to the last holder is likely to have a closer connection with the *Raj* and its officers and servants, than a distant relation of the *Raja*, who may be the nearest in relation to the common ancestor. Hence the former would naturally be respected by persons connected with the *Raj*, and be looked upon by them as the proper successor to the existing incumbent. He would thus be in an advantageous position to easily take possession of the estate on the death of the last holder, and then to maintain his title to the same. And thus has arisen the importance of the last holder, with respect to succession and other matters.

The kind of primogeniture applicable to a particular estate is generally settled by proof establishing the local or the family custom. So a consideration of the principles and the arguments set forth in the above discussion may not be necessary in cases where there is a clearly established custom of succession.

It has already been said that it is of the essence of special customs and usages modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence: *Ramalakshmi* v. *Sivanantha*, 14 M.I.A., 570 = I.A., Suppl., 1.

Case-law on succession.—Let us now turn to the decisions of our Courts on the subject of succession to these impartible estates. In some cases, the greatest importance is attached to the last holder who is deemed to be full owner and as such to become a fresh stock of descent: *Muttuvadu* v. *Periasami*, I.L.R., 16 M., 11. On appeal from this decision, the Judicial Committee have held that, "when an estate is impartible it is enjoyed in a different mode from that prescribed by the ordinary Hindu law, but the inheritance is to be traced by the same mode, unless some further family custom exists beyond the custom of impartibility:" and that accordingly the elder daughter's son who was the last male owner became the stock from which the descent had now to be traced, the ancestor who was his predecessor in title being no longer that stock: and that the son of the last male owner is entitled to succeed in consequence of the full and complete ownership of his father who had himself become a fresh root of title: I.L.R., 19 M., 451 = 23 I.A., 128.

The distinction between the Dáyabhága and the Mitáksharà should, however, be always kept in view, according to the former of which it was held by the Privy Council in the *Tipperah* case, that "it is the nearest in blood to the *last* male holder, that is the proper heir, and *not* the senior member of the whole group of agnates:" 12 M.I.A., 523 = 12 W.R., P.C., 21.

I have already told you that an impartible estate may be the subject of co-ownership so as to pass by survivorship to male members, to the exclusion of the widow, the daughter and the daughter's son, of the last holder. It should be borne in mind that this can take place only when the family is joint and governed by the Mitáksharà. Succession has been determined by survivorship in the following cases: *Naragunti* v. *Vengama*, 9 M.I.A., 66; 17 W.R., 316; 24 W.R., 255 = 2 I.A., 263; I.L.R., 1 M., 312 = 5 I.A., 61; I.L.R., 4 M., 250; 5 A., 542; 7 A., 1 = 11 I.A., 149; 4 C., 190 = 5 I.A., 149; I.L.R., 18 C., 151; 17 M., 316; 30 A., 408; 10 W.N., 95.

In a Mitáksharà joint family there is no distinction between full and half blood; hence a half-brother senior in age succeeds by survivorship to an impartible estate, in preference to a younger brother of full blood; *Subramnya* v. *Siva*, I.L.R., 17 M., 316; *Ramasami* v. *Sundara*, 17 M., 422.

In the jungle mehals, the lineal primogeniture appears to obtain as a local and family custom, as has been found in several cases, most of which are not reported, see 19 W.R., 239. In a recent case, the lineal primogeniture is held by the Judicial Committee to apply to Dhalbhum one of the estates in the Jungle Mehals. The Dhalbhum family is one of the families whose ancestors originally came from the north-west and established themselves by conquest in the Jungle Mehals, and is governed by the Mitáksharà law. In all the families the Raj descends to a single heir, and some of them keep up a sort of semi-royal state, and dignify the heir apparent and those in immediate succession with titles of honour which denote precedence. These titles have already been set forth: p. 505. After describing the estate in this manner their Lordships observe that the fact "that according to the kulachar or custom in this family, and those belonging to the same group, a grandson whose father is dead succeeds to the grandfather's estate in preference to a surviving uncle"—"has an important bearing on the question" whether "the rule of lineal primogeniture applies in cases of collateral relationship." Their Lordships also hold that "the precedence conferred or marked by the titles of honour

given to the sons of the reigning Raja in order of seniority, a precedence which would naturally be attached to the lines of descent traced from them" also points in the same direction. —*Moheschunder* v. *Satrughan*, 29 I.A., 62.

It has, however, been held with respect to the Talukdari estates in Oudh that in cases where the holder's name is entered in the second list prepared under Act I of 1869, and not in the third, the estate, although it is descendible to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture; *Achal Ram* v. *Uday Pertap*, 11 I.A., 51.

In such cases the degree prevails over the line; but where the degree is equal, the line prevails:—*Naraindar* v. *Achal*, 20 I.A., 77.

Priority among sons by different mothers.—When the last holder leaves sons by different wives of the same caste, the first-born son is entitled to become the successor, although his mother may be junior to his father's other wives that are also mothers of male issue. The rank or position of the mothers does not confer priority:—*Ramalakshmi* v. *Sivananantha*, I.A., Sup., 1; *Penda Ramappa* v. *Bangari Seshamma*, 8 I.A., 1 = I.L.R., 2 M., 286; *Jagdish* v. *Sheo*, I.L.R., 23 A., 369 = 28 I.A., 100.

But if the holder leaves sons by wives of different castes, then a junior son by the wife of the higher caste is superior to an elder son by a wife of the lower caste: *Ramasami* v. *Sundara*, I.L.R., 17 M., 422; I.L.R., 22 M., 515 = 26 I.A., 55.

As succession depends on custom, there may be a valid custom whereby the junior son by a senior wife has prior right of succession, to an elder son by a junior wife. The seniority and juniority are determined by the date of marriage and not by age: I.L.R., 17 M., 422 *affirmed* by the Privy Council, I.L.R., 22 M., 515 = 26 I.A., 55.

It has been held that for determining who is to be heir to an impartible estate, the same rules apply which also govern the succession to partible estates, though these estates may be held by only one member of the family at a time; and accordingly it has been held that an illegitimate brother succeeds in preference to a legitimate but remoter relation. I have already told you that it is difficult to understand the principle enunciated in this case, namely, *Jogendra Bhupati* v. *Nityanund*, I.L.R., 18 C., 151 = 17 I.A., 128; See p. *ante* 253.

Debts of deceased holder.—It has already been shown that the holder of an impartible estate has been held by the highest

tribunal to be competent to alienate the estate by a deed or by a will: while it is also held by the same tribunal that such an estate "may *belong to an undivided family*" and may be "*part of the common family property*"; and the Madras Legislature has declared the impartible estates to be inalienable, and has thus divested the decision in the *Pitapur* case, of authority as a precedent; and the same tribunal has further declared that before the said decision, these estates had been understood to be legally inalienable, excepting the life-interest of the holder in the same (31 I.A., 1); and the *Panchis sawal* of Orissa supports the view that an impartible estate belonging to a joint family is inalienable. Now if we confine our attention to the principle enunciated by the Judicial Committee in the *Pitapur* case, namely, that the holder of an impartible estate can devise it to an illegitimate son of his by excluding his adopted son the legal heir, and assume that this principle should be carried out to its apparently logical consequences, then the legatee cannot be permitted to enjoy the estate without paying off the testator's debts out of the estate. And accordingly it has been held that if the debts of the deceased holder be a charge on the estate in the hands of his legatee, there seems to be no reason why they should not be a charge on the estate in the hands of his son and heir, who can no longer be said to take the estate by survivorship; hence a son taking the estate by descent takes it with the burden of a decree obtained against the father, and is liable to be proceeded against in execution: *Ram Das* v. *Tekait Braja*, 6 W.N., 879; *Sreeman* v. *Sree*, I.L.R., 32 M., 429. But in these cases the sons were liable for their father's debt; for, whether they acquired right by birth and took the estate by *survivorship*, or not, they would be equally liable. It was, therefore, unnecessary to express an opinion in direct conflict with the decisions of the Privy Council.

Hence, on the other hand, having regard to the cases declaring an impartible estate to be joint family property, it has been held that when a brother takes by survivorship such an estate, it is not assets of his predecessor in his hands (*Kali Krishna* v. *Raghunath*, I.L.R., 31 C., 224; 29 M., 453); and he is not bound to pay the debts of the deceased holder, excepting such as were contracted for justifisble causes: *Gopal* v. *Raghunath*, 32 C., 158. According to the Madras Act, only debts contracted for legal necessity affecting the whole joint family, may become a charge on the estate. This Act appears to attach no special importance to the father's debts which also are recoverable

only in case the same were contracted for legal necessity; and thus, in so far as regards impartible estates, the Act restores the law regarding the father's debts to the former state in which the son's pious liability, was attached only to debts proved to have been incurred for legal necessity, or at any rate for valid purposes of the family.

Conclusion.—It ought to be stated at the conclusion that the conception of impartible estates and their incidents, hitherto entertained by the people and the legal profession, upon the footing of which this chapter was originally compiled, seems to be at variance with the holder's right of alienation as explained in the recent decisions of the highest tribunal whose pronouncements are binding on all courts and suitors as positive rules of law. The conflict of authority, however, has created considerable difficulty.

An impartible estate is to be regarded according to the recent decisions with respect to alienability, as ordinary property, save and except this only, that by reason of its impartibility, it is to descend to a single person to be selected from amongst the deceased owner's heirs, all of whom cannot be entitled to participate it, as it is not partible property; the selection is to be made according to custom, the heirs other than the one entitled to the estate are entitled to get only maintenance out of it. Subject to this liability to provide maintenance for the junior members, the holder of the estate is its complete and absolute owner, in the same way as of any other property, and competent to dispose of it in any manner he pleases either by a deed or a will, and it is descendible to one of *his heirs*, unless there be special family custom to the contrary proved by satisfactory evidence. Impartibility does not imply that the estate is to be preserved entire and undiminished; it merely means that the property is not liable to be divided by the deceased holder's heirs if more than one.

While the former view is also supported by the authority of judicial decisions, customs, and legislation. The preamble of Regulation xi of 1793 which declares the permanently settled estates to be heritable according to the ordinary law, recites the previous state of things, thus—"A custom, originating in considerations of financial convenience, was established in these provinces under the Native Administrations, according to which some of the most extensive Zemindaries are not liable to division." And this custom is declared by Reg. x of 1800 to be still in force as regards the impartible estates. These Regulations

clearly support the view, according to which impartible estates are to be preserved entire and undivided, and are not liable to partition by heirs or otherwise, and accordingly inalienable, the holder being merely a life-tenant and manager of the estate which belongs to a joint family. In an Article contributed to the Law Quarterly Review, vol. xvi, page 77, Sir Comer Petheram the late Chief Justice of Bengal points out that the doctrine enunciated by the Privy Council in *Sartaj Kowari's* case does not represent the Hindu view of their own law, and also the living customary rules or laws by which Hindus of the Mitákshará school regulate their lives and properties.

But the people are bound by the pronouncement of the Privy Council, so long as the same is not modified by their Lordships themselves or by the Legislature.

CHAPTER XVI.

ALIENATIONS AND WILLS.

ORIGINAL TEXTS.

१ । क्रमागते गृहक्षेत्रे पिता पुत्राः समांशिनः ।
पैतृके न विभागार्हाः सुताः पितुरनिच्छतः ॥
स्थावरं द्विपदश्चैव यद्यपि स्वयम् अर्ज्जितं ।
असम्भूय सुतान् सर्व्वान् न दानं न च विक्रयः ॥
ये जाता येऽप्यजाता वा ये च गर्भे व्यवस्थिताः ।
वृत्तिं तेऽपि हि काङ्क्षन्ति वृत्तिलोपो विगर्हितः ॥ व्यासः ॥

1. In houses and fields descended in regular course of succession (from paternal ancestors) the father and sons are equal sharers; but as regards the property acquired by the father himself, the sons are not entitled to partition, against the will of the father. Though immoveables and bipeds (slaves) have been acquired by a man himself, neither a gift nor a sale (of them should be made) without convening all the sons. For, those (issue) that are born, and those that are yet unbegotten, as well as those that are in the womb (of their mothers), all require means of support, hence the dissipation (by sale or gift without the consent of sons), of the means of support (namely, the immoveables and slaves) is highly censured.—Vyása.

२ । भूर्या पितामहोपात्ता निबन्धो द्रव्यम् एव वा ।
तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि ॥ याज्ञवल्क्यः ।

2. In land acquired by the paternal grandfather or a remoter paternal ancestor, or in corrody (*nibandha* = periodic benefit permanently derived from a person or property), or in chattels (=slaves, acquired by him) the ownership of the father and the son is the same.—Yájnavalkya.

३। द्रव्ये पितामहोपात्ते स्थावरे जङ्गमे तथा।
समम् अंशित्वम् आख्यातं पितुः पुत्रस्य चैव हि॥
पैतामहं हृतं पित्रा स्वशक्त्या यदुपार्ज्जितं।
विद्या-शौर्य्यादिनाप्तञ्च तत्र स्वाम्यं पितुः स्मृतं।
प्रदानं स्वेच्छया कुर्य्याद् भागञ्चैव ततो धनात्॥ वृहस्पतिः।

3. In property immoveable as well as moveable, acquired by the paternal grandfather (or a remoter paternal ancestor) the parcenership of father and son is declared to be equal. In such ancestral property as was lost and recovered by the father through his own ability, and in what is acquired by learning, prowess and the like, the father's ownership is ordained. Of such property the father may make gift or distribution according to his pleasure.—Vrihaspati.

४। मणि-मुक्ता-प्रवालानां सर्व्वस्यैव पिता प्रभुः।
स्थावरस्य समस्तस्य न पिता न पितामहः॥ याज्ञवल्क्यः।

4. The father is master of all the gems, pearls, and corals; but neither the father nor the paternal grandfather is so of the whole immoveable property.—Yájnavalkya.

५। स्थावरस्य समस्तस्य गोत्रसाधारणस्य च।
नैकः कुर्य्यात् क्रयं दानं परस्परमतं विना॥
विभक्ता अविभक्ता वा सपिण्डाः स्थावरे समाः।
एको ह्यनीशः सर्व्वत्र दानाधमन-विक्रये॥ व्यासः।

5. A single parcener shall not without the consent of the rest make a sale or gift of the whole immoveable estate, or of what is common to the *gotra*-gentiles. Kinsmen whether separated or undivided are equal in respect of immoveables: for, one has not power over the whole, to give, mortgage or sell.—Vyása.

६। एकोऽपि स्थावरे कुर्य्याद् दानाधमनविक्रयम्।
आपत्काले कुटुम्बार्थे धर्म्मार्थे च विशेषतः॥ वृहस्पतिः।

6. Even a single member may make a donation, mortgage or sale of immoveable property, during a season of distress, for the sake of the family, and especially for religious purposes.—Vrihaspati.

७। विभक्ता अविभक्ता वा सपिण्डाः स्थावरे समाः ।

एको ह्यनीशः सर्व्वत्र दानाधमन-विक्रये ॥ वृहस्पतिः ।

7. Separated or unseparated Sapindas are equal in respect of immoveables; for, in all circumstanses, one is incompetent to make a gift, pledge or sale (of the same).—Vrihaspati.

८। स्थावरे विक्रयो नास्ति कुर्य्याद्-आधिम् अनुज्ञया ॥

8. In immoveable property there is no sale; mortgage may be made by consent (of parties interested).

९। भूमिं यः प्रतिगृह्णाति भूमिं यश्च प्रयच्छति ।

तावुभौ पुण्यकर्म्माणौ नियतौ स्वर्गगामिनौ ॥

9. He who accepts land and he who gives the same, both of them are performers of a holy deed, and shall certainly go to the blissful region of heaven.—Cited in the Mit., 1, 1, 32.

१०। प्रतिग्रहः प्रकाशः स्यात् स्थावरस्य विशेषतः ॥ याज्ञवल्क्यः ।२।१७६॥

10. Acceptance of a gift shall be public, especially of immoveable property.—Yájnavalkya, ii, 176.

11. [The founder of the Bengal school does not admit the Mitákshara doctrine of *right by birth*, according to which the *birth* of the male issue is the *cause* of his *co-parcenery right* to the property of the father and other paternal ancestor, which property is therefore called *unobstructed heritage*; but he maintains that *heritage* is *always obstructed*. *Obstructed heritage* is also recognised by the Mitákshará but is held to be applicable to collaterals only, and not to male issue the heir *par excellence*. Accordingly Jímútaváhana maintains that the *demise* of the father or deceased owner is the cause of the heritable right of the son or heir. To this position an objection may be raised, namely, how can one person's act such as the owner's death, be the cause of the right of another person, such as of the heir, the ordinary rule being,—one's own exertion is the cause of his proprietary right. This objection which is equally applicable to the *obstructed* heritage under the Mitákshará,—is thus obviated by the founder of the Bengal school.—Dáyabhága Chapter I, paras. 21-24,—]

अन्य-व्यापारेण अन्यस्य स्वत्वम् अविरुद्धं, शास्त्रमूलत्वाद्-अस्य । दृष्टञ्च लोकेऽपि दाने हि चेतनोद्देशत्यागाद्-एव दातृ-व्यापारात् सम्प्रदानस्य स्वत्वं । २१ ।

न च स्वीकारणात् स्वत्वं स्वीकर्त्तुरेव दातृत्वापत्तेः । परस्वत्वा-पत्तिफलेन हि दानरूपता, तच्च च फलं सम्प्रदानाधीनं । यथा देवतोद्देशेन द्रव्यत्यागं कुर्व्वन्नपि यजमानो न होता, किन्तु तस्यैव

त्यागस्य होमाभिधाननिमित्तं प्रक्षेपं कुर्व्वन् ऋत्विग्-एव होता इति उच्यते तद्वद्-अत्रापि स्यात्। किञ्च "मनसा पात्रम् उद्दिश्य" (*a*) इत्यादि शास्त्रे स्वीकारात् प्रागेव दानपदं दृष्टम्। २२।

ननु ग्रहणं स्वीकारः, अभूततद्भावे च्वि प्रयोगात्, अस्वं स्वं कुर्व्वन् व्यापारः स्वीकारो भवति, कथं तत् प्रागेव स्वत्वं। २३।

उच्यते, उत्पन्नमपि स्वत्वं सम्प्रदानव्यापारेण मम इदम् इति ज्ञानेन यथेष्टव्यवहारार्हं क्रियते इति स्वीकारशब्दार्थः। याजनाध्यापनसाहचर्य्याच्च च (*b*) प्रतिग्रहस्य स्वत्वम् अजनयतोऽपि अर्ज्जनरूपता न विरुद्धा, याजनादौ दक्षिणादानादेव स्वत्वं। २४।

(*a*) मनसा पात्रम् उद्दिश्य भूमौ तोयं विनिक्षिपेत्।
विद्यते सागरस्यान्तो दानस्यान्तो न विद्यते॥

(*b*) अध्यापनम् अध्ययनं यजनं याजनन्तथा।
दानं प्रतिग्रहश्चैव षट्कर्म्माण्यग्रजन्मनः॥
षण्णान्तु कर्म्मणाम् अस्य त्रीणि कर्म्माणि जीविका।
याजनाध्यापने चैव विशुद्धाच्च प्रतिग्रहः॥ मनुः, १०। ७५,७६।

11. (The accrual of) one's proprietary right by another's act is not inconsistent, by reason of its being founded on the Shástras: and apart from the Shástras, it is seen also in the world (*i.e.*, in the actual practice among people), since, in the case of *gift*, the donee's ownership in the thing (given) arises from the giver's act consisting of the relinquishment in favour (*i.e.*, with the intention of causing ownership) of a sentient being:—D.B., 1, 21.

Nor can it be contended, that the proprietary right (of the donee) arises from (acceptance, literally) appropriation (by him, of the thing given); since, in that case, there would arise this objection, namely, that the acceptor (or the donee) alone would become the *giver* (according to the grammatical rules); since, gift consists of an act of which the effect is the generation of another's proprietary right, and that effect would depend on (the act of acceptance by) the donee (according to the contention), in the same manner as a sacrificer, though making the relinquishment in favour of the Deity, of a thing (owned by him) is not called the *hota*, but the priest alone as performing the act of throwing (that thing into the sacrificial fire) which (act) is the cause of applying the name of *homa* to the relinquishment of that very thing,—is called the *hota*. Besides in passages of the Shástras such as (*a*) "Intending in mind a fit object of the gift &c.," (the use of the word *gift* is found even before acceptance.—D.B., 1, 22.

Should it be contended that as *swíkára* means *appropriation*,—since by reason of the use of the affix *chwí* (in the word *swíkára*) which implies becoming (of a thing) what it before was not (*swíkára* =) *appropriation* consists of an act making that one's *property* which *was* not his *property*,—how can proprietary right arise antecedent to the same (*i.e.*, appropriation or acceptance)?—D.B., 1, 23.

The answer is, though proprietary right has already arisen (from the donor's act) yet it is by the donee's act consisting of the knowledge that "it is mine" that the property is made liable to user according to pleasure: and this is the meaning of the word (*swíkára* =) *appropriation* (or acceptance). Although acceptance (of gifts) do not (immediately) create proprietary right, still its being a mode of acquisition like officiating as a priest, and teaching, with which it is associated (*b*) is not inconsistent: for, in the case of officiating as a priest, and so forth, the proprietary right arises from the gift of the fees.—D.B., 1, 24.

(*a*) Intending in his mind a proper object of the gift, (the donor) should throw water on the ground (indicating the mental act of giving) there are bounds of the ocean, (but) there are no bounds of *gift*.

(*b*) Reading (the Shástras) and teaching (others to read them), performing sacrifices and officiating as priest (in sacrifices performed by others), making gifts (to the poor) and accepting gifts (made to them by the virtuous), are the six acts of the first-born caste: but of these six acts of this caste, three are his means of livelihood, namely, officiating as priest, teaching, and acceptance of gift from a pure person.—Manu, x, 75-76.

१२। गताश्चात्वागमिष्यन्ति ये कुले मम बान्धवाः ।
ते सर्व्वं तृप्तिमायान्तु मया दत्त-जलेन वै ॥
सर्व्वभूतेभ्य उत्सृष्टं मयैतज्जलम् ऊर्ज्जितं ।
रमन्तां सर्व्वभूतानि स्नानपानावगाहनैः ॥ जलाशयप्रतिष्ठातत्त्वधृतवचनं ।

12. Let all the relations in my family, that have come to this world, or will (hereafter come, *i.e.*, those now existing as well as those that will come into existence in future), have satisfaction by means of the water; let all beings enjoy it by washing, drinking and bathing.—This text is cited by Raghunandana in his work called consecration of Tanks.

ALIENATIONS.

Descriptions of property.—Three descriptions of property are found in the (Smritis) codes of Hindu law, namely, immoveable, moveable and *Nibandha*. Great importance is attached to immoveable property, the ownership of which, appears to have been recognized by ancient law to be vested in joint families the units of archaic society, or in the village communities which were but expanded families, and not in the individual members thereof. It was deemed to be the hereditary source of maintenance not only of those members of the family

that were in existence for the time being, but also of those that were to be born in future as well as of those that had departed for heaven to whom oblations were to be regularly offered every month which constitutes a day of the (*pitris*) deceased ancestors. Land being thus dedicated, as it, were, to the family deemed to consist of the departed, the living and the future members, or to the village community, and the ownership being therefore vested in that permanent ideal entity, its living members could not be competent to alienate its property, which they were only entitled to use, occupy and enjoy, but bound to protect, preserve and pass on to their successors without dissipation.

Texts absolutely prohibiting alienation of land appear to indicate the ancient law. In the course of time, the right of alienation had to be recognised, and it appears to have first come into existence in the form of gift of land to meritorious and useful strangers, for inducing them to reside in a village for the benefit of the community, such as grants of land to a Bráhmana who was to impart religious instruction, to a physician for medical treatment, and to a person distinguished for secular learning for imparting secular instruction and helping the people in other ways,—called respectively *Brahmotter*, *Vaidyotter*, and *Mahattran*.

The next step in advance towards right of alienation was when a necessity affecting the whole family could not otherwise be met than by a transfer of landed property, which consistently with the prohibition against alienation, took the shape of the pure usufructuary mortgage that appears to be the earliest kind of pledge of land. The alienation could be made by the *kartá* or the head of the family.

In process of time, however, out and out sale of land came to be recognised but still subject to the restrictions applying to families governed by the Mitákshará. Moveable property was not of much importance in former days, and its alienation is not fettered by restrictions, the property being, from its very nature, easily removeable and difficult to trace. Although at present such property has acquired great importance specially in the shape of *funded property*, such as public debt, municipal debenture and share of Railway or other joint stock companies, as well as ships, machinery and the like.

Nibandha or corody is some thing of value periodically received by one person from another, on the strength of a grant. The illustrations of *nibandha* given in the Mitákshará while explaining the term show it to be a benefit derived from

land (Mit., 1, 5, 4,); but the Dáyabhága explains it to be what is promised by one person to be given periodically to another, as on the month of Kártika every year: (D.B., 2, 13).

The incidents of immoveable property appear to be applied to this kind of property. Government Promissory Notes and similar *funded* property were unknown to Hindu law: considering their importance they should be deemed as *nibandha* and not as moveable property under Hindu law. These ought to have the incidents which Hindu law annexed to *nibandha, i.e.*, the incidents of immoveable property. This appears to be the conclusion that is consistent with the spirit of Hindu law, and is also supported by the explanation of the term given by the founder of the Bengal school in the Dáyabhága. According to this explanation the annuity which is promised in the form "*I will give it every month of Kártika,*"—does not seem to be necessarily annexed to land, but to create a personal obligation, although the right to receive and the liability to pay, may both be intended to be heritable, such as an annuity to a spiritual guide, the relation of disciple and spiritual guide being a heritable one, (Manu, viii, 388); instances like this, however, are now held to be, matters of moral obligation only.

But *nibandha* or corody has been held to be limited to benefits arising out of land, and accordingly Government Promissory Notes have been held to have the incidents of moveable property: 5 W.R., 141.

There was another kind of property which, regard being had to its importance, was by Hindu law placed in the same category with land, but which has ceased to exist in British Empire by reason of the humane legislation prohibiting the recognition of, and declaring it to be a serious crime to hold, such property. Slavery or proprietary right of man over man, was recognised by ancient law in all countries. Mankind owes a deep debt of gratitude to the British people for their humanity, who spent millions of money for abolishing slavery by emancipating the slaves existing at one time in the British Empire on payment of compensation to their owners, and who have since been sparing no pains to suppress in all countries this inhuman usage.

Thus we find four kinds of property dealt with by the commentators on Hindu law, namely, (1) land, (2) *nibandha*, (3) slave, and (4) moveable. The first three are placed in the same category regard being had to their importance, and have the same incidents as immoveable property, in contradistinction

to those of the moveable property. Now, what things were the Hindu lawyers contemplating, as constituting moveable property while they were dealing with the classification of property? The household furniture, the wearing apparel, the few ornaments put on by females, the domestic animals, the implements of agriculture or mechanical art carried on by the family, grains and the like are the only things they were thinking of, as composing moveable property, which was deemed to be of lesser importance. It would not be right or reasonable to include under the term *moveable* of Hindu law, the important kind of property that was unknown to ancient law, but has come into existence in the course of progress of the Western civilization of modern time, such as the *funded* property which bears a closer resemblance to the *nibandha* or corody of Hindu law.

Capacity to alienate.—The subject of alienation has already been considered while the Mitákshará Joint Family, the Female Heirs, the Endowed Property, and the Impartible Estates have been dealt with. Some general principles only relating to alienation may shortly be stated here.

It should be observed that an owner may be incompetent to alienate his own property, while a person who is not the owner, or who is only a part owner, may, under certain circumstance, be authorized to alienate what belongs entirely to another person, or jointly to himself and others.

Capacity to alienate is also affected by the nature and character of the property, as being moveable or immoveable, joint or separate.

In the case of joint property, the capacity of a co-owner is affected by the nature of the joint tenancy, as the co-owners being joint-tenants or tenants-in-common; the joint-tenancy again may be convertible into separate tenancy, or it may be unseparable as in the case of two or more female heirs.

The capacity of a joint-tenant is affected also by the purpose for which the alienation is made,—being a joint one of all the joint-tenants, or a personal one concerning himself alone.

Owner incompetent to alienate.—Want of discretion incapacitates a person from making any transfer of his property; accordingly a person who is a minor, or an idot, or a lunatic, cannot alienate his property.

According to Hindu law women are deemed to be wanting in discretion, and therefore they require the guidance of their male relations in managing and dealing with their property.

The Dáyabhága distinctly lays down that a widow inheriting her husband's estate, must remain under the control of her husband's kinsmen *i e.* the reversioners, with respect to the management and disposal of property: xi, i, 64.

It cannot but be admitted that females are impulsive, and are carried away by their feelings and sentiments which control their actions, and to which their reasoning power is subordinated. Having regard to this natural defect in the character of women, Hindu law provides, that women must, in all stages of their life, be under the guardianship of their male relations.

The Legislature appears to have accepted this principle in placing a female possessed of large property under the Court of Wards, and in providing that she cannot deal with any property without the consent of her constituted legal guardian.

And accordingly our Courts also require proof, in cases of alienation by Hindu ladies, that they had disinterested and independent advice, and that the deed was explained to, and understood by, them: *ante* p. 437-8.

Alienation of moveables.—There are only two questions that arise for consideration with respect to the alienation of moveables, namely, (1) the father's power of alienation over ancestral moveables, under the Mitákshará and (2) the widow's power over inherited moveables.

As regards the Mitákshará father's power of alienation over ancestral moveables it has already been said that alienation to an outsider should be distinguished from unequal distribution without any justifying cause, among the male issue who are also joint owners. Gifts of small portions out of affection, to members of the family are expressly allowed. But a bequest of the bulk of ancestral moveables to one of two sons to the exclusion of the other cannot be valid; see *ante* p. 213.

The restrictions imposed on a Hindu widow against alienation of the husband's estate apply to moveables as well as to immoveables, in all the schools (8 M.I.A., 529; 11 M.I.A., 506; I.L.R., 8 M., 290) expecting in Mithila, and in Bombay as regards those that are governed by the Vyávahára-Mayúkha: I.L.R., 10 C., 392; 16 B., 229, 233.

According to the commentaries of the Mithila school the widow's rights in property inherited from the husband are the same as in property *given* by him, that is, absolute in moveables, and limited to life-interest in immoveables. Hence inherited moveables should become the female heir's *Stridhan*.

In Bombay it has been held that although under the Mayúkha,

a widow has absolute power of alienation over moveables inherited from the husband, yet she cannot bequeath the same by a will: I.L.R., 17 B., 690. It is no doubt true, that a usage has sprung up in some districts in Bombay, recognising widow's power of alienation over moveables upon the authority of Mayúkha, but it is difficult to find any passage in that work, supporting or justifying the said view.

In the other schools although a female heir has only the Hindu widow's estate in moveables as well as in immoveables, yet no other rule is laid down to preserve the rights of the next heirs in the moveable property inherited by a woman, than the provision that a widow must be subject to the control of the husband's kinsmen, as regards the management and the disposal of the husband's property. This provision however, has been deemed to be of moral obligation only: in this view, however, it would be difficult to protect the reversioner's interest from defeasance by the widow's unauthorized disposal.

Hence in a recent case Justice Saradacharan Mitra observes with respect to that provision—"These are no doubt moral injunctions, but practical effect has always been attempted to be given to them so far as circumstances at the present time allow": I.L.R., 31 C., 214, 220 = 8 W. N., 11.

Alienation of a single co-parcener's interest.—One of the fundamental points of distinction between the two schools, consists in the difference in the nature of tenure of joint property: in Bengal co-heirs take as tenants-in-common, or to use the expression of Jímútaváhana, the right of each co-heir accrues and extends to a fractional portion only of the joint inheritance, and acting together, force each other to limit its operation to and adjust itself distributively on, particular portions only of the aggregate, which portions existing from before, but not manifest, are only made known by partition. One of the legal consequences deduced from this doctrine, is, that each co-parcener is free to alienate his share without the consent of his co-heirs.

Whereas under the Mitákshará, co-parceners are joint-tenants, the right of each extending to the whole estate, or the whole estate being jointly vested in all the co-heirs; so that no one has any definite share in the property, which they hold as a corporate body. Hence no individual member can alienate any joint property in which he has not individually any such right or interest as may be transferred. Though one member alone is entitled to enforce partition and so cause the joint title to be converted into several ones, and have a separate share out

of the aggregate, which share, if allotted exclusively to him alone, may be transferred by him according to his pleasure. A single member, however, may alone *as representing* the whole family alienate any joint property for a family purpose; the incapacity relates to an alienation of his own interest only for his personal purpose.

The Mitákshará law incapacitating a co-parcener from alienating his undivided co-parcenary interest has been modified to some extent in Madras and Bombay by the operation of the principles of equity, in favour of purchasers for value, founded on the co-parcener's unrestricted right to call for partition: p. 226 *supra.*

But as regards volunteers *i.e.* donees and legatees, the old rule against alienation of undivided co-parcenary interest is strictly maintained, and no member of a joint family in southern India can make a valid *gift* or *bequest* of his joint interest: see pp. 229 *supra.*

The tenure of property inherited by co-widows or two or more daughters is deemed to be unseparable joint-tenancy so that there cannot be such a partition between them as to cause a division of title and the conversion of the joint estate into two separate estates to be held in severalty; hence one cannot make any valid alienation without the consent of the others: I.L.R., 16 M., 1. But there may be a division of possession by agreement between them, or even by a decree of court, for the limited purpose of securing to each a distributive enjoyment of the benefit of the joint property, but keeping intact the right of survivorship: 8 W.N., 658. They may also divide the property by contract, and agree to release their mutual right of survivorship and take possession of their shares with power of alienation; and so each may take an estate in her share during the life of both, so that the survivor is not entitled to claim any property alienated by the deceased, the alienee being entitled to hold it during her life also: I.L.R., 22 M., 522. It is also held that one of them may alienate her life-interest in the estate: I.L.R., 26 M., 334. And it is further held that a compulsory sale in execution of a money-decree of her life-interest would entitle the purchaser to hold it for her life: I.L.R., 11 M., 304.

Alienation by non-owner.—A sebait or trustee managing an endowed property, and a guardian managing an infant's estate, may in certain circumstances alienate the property under their charge, although they have no personal interest in the same.

So the Kartá or a member of a joint family may make a valid alienation of the interests of himself as well as *of other members*, in a joint property, under certain circumstances. Similarly a Hindu widow or any other female heir whose right of alienation in the property inherited by her, is ordinarily restricted, may make a valid transfer for raising money for certain purposes.

All these analogous cases are governed by the same general principles. The circumstances justifying transfers may vary in the different cases, but they must come under one of two heads namely either Necessity or Benefit to the estate or to the person, including spiritual benefit. The lender or the transferer is bound to enquire into the necessity or the benefit.

The leading case on this subject is, that of *Hunooman Persad Pandey* v. *Musst. Babooi Munraj Koonwari*, (6 M.I.A., 393 = 18 W.R., 81). This classical judgment of the Judicial Committee was pronounced with respect to the power of a manager of an infant's estate. The principles laid down are as follows,—

1. "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of *need*, or for the *benefit* of the estate.

2. "But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona-fide* lender is not affected by the precedent mismanagement of the estate.

3. "The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.

4. "The lender is bound to enquire into the necessities for the loan, and satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance, for the benefit of the estate.

5. "If he does so enquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge": in other words, "a *bona-fide* creditor or transferee should not suffer when he has acted honestly and with due caution, but is himself deceived. And

6. "Under such circumstances, he is not bound to see to the application of the money."

In the case of *Baboo Kameswar Persad* v. *Run Bahadoor Singh* (8 I.A., 8, 11) in which a mortgage executed by a Hindu widow was sought to be enforced against the reversioner, their

Lordships held that those principles laid down in the case of *Hunooman Persad Panday*, apply—"not only to the case of a manager for an infant which was the case there, but to transactions on all-fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Mitákshará law, has made an alienation of ancestral family estate. The principle broadly laid down is, that although the lender is not bound to see to the application of the money, and does not lose his rights if upon a *bona-fide* inquiry he has been deceived as to the existence of the necessity which he has reasonable grounds for supposing to exist, he still is under an obligation to do certain things." Then their Lordships cite from the judgment passages set forth above in paragraphs 4 and 5. And their Lordships go on to observe—"such being the law any creditor who comes into court to enforce a right similar to that which is claimed in the present suit is bound at least to shew the nature of the transaction, and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities." As to the power of a widow to borrow for the purposes of a trading business inherited by her on the credit of its assets see 25 I.A., 192 and I.L.R., 26 B., 206.

And in the case of *Prosunno Kumari Debya* v. *Golab Chand Baboo*, their Lordships held that those principles apply also to the power of a sebait and manager of property dedicated to the worship of a Deity. Their Lordships say,—"The authority of the Sebait of an idol's estate would appear to be * * * analogous to that of the manager for an infant heir, which was thus defined in a judgment of this Committee, delivered by Lord Justice Knight Bruce," and then the above passages are cited; 2 I.A., 145, 151.

As regards the capacity of the Pardanashin Hindu ladies to alienate property, it should be borne in mind that the status assigned, and appears to be rightly assigned, to them by Hindu law, is, that of life-long pupilage or tutelage. Hence they should be permitted to exercise this exceptional power only in cases of need or preservation of the estate.

Other persons competent to transfer property not their own are Executors, Administrators, Trustees, Partners, Agents and the like, who are authorized by statutes or by the owner's express or implied consent. These cases are merely alluded to here; the power of the two first is discussed later on.

The principles so lucidly enunciated by their Lordships in *Hunooman Persad's* case, and applied to other cases of analogous character, have been adopted and embodied by the Indian Legislature in Section 38 of the Transfer of Property Act.

Gifts.—The subject of gift is discussed in the Hindu codes and commentaries, under the Head, Topic of Litigation, or Form of Action, called Resumption of Gifts, where gifts are divided into four-classes, namely, (1) *proper*, (2) *improper*, (3) *valid* or (4) *invalid* the original words being *deya* (देय = what should be given) *adeya*, (अदेय = what should not be given) *datta* (दत्त = *given i.e.*, irrevocably) and *a-datta* (अदत्त = ungiven).

1. A *proper gift* consists of the donation of the donor's own property, which is not prohibited. If a person has more property than what is sufficient for the maintenance of those he is bound to support, he may make a *proper* gift of the excess. The Hindu Codes recognize a man's proprietary right over his wife and son, but condemns a gift or sale of them; hence a gift of them would be *improper*, as appears from what follows.

2. Subjects of *improper gift* are, either what are not the donor's own or exclusive property (though they are in his possession), or are what is forbidden to be given away: they are enumerated in the following text of Nárada, thus,—"The sages declare that a person cannot, even when placed in distressful calamities, make a *proper* gift of a thing entrusted to him by its depositary, or borrowed (by him from another) or pledged (to him), or what is joint property (of himself and his co-parceners), or what is deposited (with him by another), or his son, or wife, or entire property, or what has been promised (to be given) to another."

The Mitákshará in commenting on this text says, that the text is intended to lay down the subjects of *improper gift*, but not to indicate want of ownership; because ownership does exist in son, wife, entire property and what is promised. It would appear therefore that a gift of these though *improper* may be valid, in those cases in which the donor is owner. For, in the same chapter, there is the following text of Yájnavalkya, —"The acceptance of a gift shall be public, especially of immoveable property;"—and the Mitákshará introduces this text, thus,—"In this text the sage declares that the acceptance of property of which the gift is *improper*, should be publicly made by the donee." So it appears that a *bona-fide* donee without notice cannot be blamed if the thing given do not belong to the donor.

3. A *valid* gift (दत्त) is defined to be what has been made by a person of sound mind, and is not liable to resumption. Nárada describes seven kinds of gifts that are lawfully made and cannot be resumed, in the following text—"The learned in the law of gifts deem as valid gifts, what is given as the price of goods sold, or as remuneration (to an artizan or the like), or for the pleasure (of hearing bards, musicians or the like), or out of affection (to a daughter or son), or in return for a benefit, or for the purpose of the bride's price, or for the purpose of spiritual benefit."

Thus it appears that a gift for consideration is recognized by Hindu Law.

4. An (अदत्त = ungiven or) *invalid* gift is defined to be that which is liable to resumption. Nárada describes sixteen kinds of gifts which are illegally made and may be resumed as if *not-given*, in the following text,—"But (1) what is given by persons under the influence of excessive fear or (2) wrath or (3) grief, or (4) suffering from disease, (5) what is given as bribe, or (6) in jest, or (7) through fraud, (8) what is given and regiven or (what is given by mistake) (9) or, what is delivered by an infant (who has not reached the sixteenth year), (10) an idiot, (11) one not *sui juris*, (12) one overwhelmed by disease, (13) a drunkard, or (14) a madman, (15) what is given with the desire of getting a return in the shape of performance by the donee, of some work (if not performed), or (16) what is given to a person not a proper object of the gift but representing himself, and mistaken by the donor through ignorance, to be a proper object, or for the performance of a religious act (falsely stated by a badman who really wanted to use the same in gambling and the like)—all this is ordained *invalid* gift (as if *not-given*)."

The fifteenth instance shows that a gift may be subject to a condition subsequent; and the gift is liable to defeasance on the non-fulfilment of the condition.

The author of the Mitákshará concludes the subject of gift, thus—"He who *accepts* any of the sixteen kinds of *invalid* gifts and he who *gives* an *improper* gift, the punishment of both of them is declared by Nárada in the following text, namely,—'He who out of covetousness accepts an *invalid* gift, as also he who gives an *improper* gift; the donor of the *improper* gift should be punished, and likewise the acceptor of the *invalid* gift.'"

It should be observed that the enumeration of *improper* gifts includes four kinds of property of which the donor is not owner, but holds the same as trustee. With respect to the gift and acceptance of the same, the following provision is found in

an early chapter of the second Book of the Mitákshará (on sloka, ii, 24),—"Punishment is ordained for the gift and acceptance of what is not (the donor's) property,—in the following text,—'He who accepts an *improper* gift (knowing that the donor is not its owner), as also he who gives an *improper* gift; both of them should be punished like thieves, and the highest penalty shall be inflicted on them.'"

There appears to be a distinction between *improper* gifts of which the donor is the owner and those of which he holds possession as mere trustee but is not owner.

According to the Indian Contract Act, Section 108, a person in possession of goods by the consent of the owner, may give a good title to a *bona fide* buyer without notice. But a volunteer donee has no such equity as may be invoked in favour of a *bona fide* purchaser for value.

It should be observed with respect to the gifts of one's own property, which are ordained *improper* as setforth above, that they are valid in law, though *morally* wrong, and that the donor is not intended to be liable to punishment for making them; his ownership being admitted, he must be held to be legally competent to make a valid gift, sale or the like alienation. Among these *improper* gifts is included the *gift of son*, which according to some Commentators applies one to the *gift of an only son.* But the *gift of a son*, whether of any son, or of an only son, is only *improper*, and *not invalid*, though the father's ownership over the son, is at present restricted as regards alienation, only to a gift for adoption. The principle of *Factum valet* is properly applicable to this case.

Definition and requisites of gift.—Gift is defined by Hindu lawyers, to be the creation of another person's proprietary right after the extinction of one's own proprietary right in the subject matter of the gift. The Mitákshará (on Yájnavalkya's sloka ii, 27) says,—"Gift consists of the extinction of one's own property, and the generation of another property; and if that another *accepts*, then and not otherwise, the generation of another's property becomes complete (or effectual or operative). The acceptance again, is threefold, namely, mental, verbal, and corporeal: mental acceptance consists of the thought,—"This becomes mine"; verbal acceptance consists of the utterance of the concept of relation (between himself and the thing given as owner and property), by an expression like—"This becomes mine"; but corporeal acceptance is manifold, consisting of receipt or touch (of the thing given), or the like."

Mental acceptance appears to be presumed from the silence of the donee when in his presence a gift is made by the donor in his favour, or when he receives a thing sent to him as a gift or present, or is informed of the gift, according to the maxim,—"what is not prohibited or dissented from, becomes permitted or assented to."

Difference between Dayabhaga and Mitakshara on gift and acceptance.—It should be observed that there are two factors in a gift, namely, (1) the extinction of the donor's right, and (2) the creation of the donee's right. In the Dáyabhága there is an interesting discussion of the question whether it is only by the donor's act of relinquishment of his right over the thing in favour of the donee, or it is also by the donee's act of acceptance of the thing, that the donee's right over the same accrues? The learned author of that treatise maintains the first, and controverts the second position that acceptance by the donee is also necessary in addition to the donor's act, for the completion of gift: he refers to a grammatical rule, according to which a word formed by the suffix *tri* being affixed to a verb, signifies the agent, on whose exertion depends the completion of the act imported by the verb, and therefore the word *dátri* or donor formed by annexing *tri* to the verb *dá* (= Latin *do*) meaning to give, must signify the person by whose act the *giving* is completed; and goes on to point out that if acceptance by the donee be admitted to be necessary for the completion of a gift, then the donee would become the donor. Accordingly he maintains that both the effects, namely, the cessation of the donor's right and the accrual of the donee's right are caused by the donor's act of *giving*. No doubt the gift cannot become effectual or operative without acceptance by the donee. If he refuses to accept, then according to the Dáyabhága his right which accrued by the donor's act becomes extinguished, and a new right accrues to the donor, as if the property were never appropriated by any person. The above passage of the Mitákshará may be construed to support either view; but the Mitákshará school appears to hold that gift itself is incomplete without acceptance.

Thus it is clear that there is an important distinction between the two schools with respect to the requisites of a valid gift: according to the Mitákshará school acceptance is necessary, there can be no complete gift without the donee's consent; whereas according to the Bengal school the donor's act of giving alone completes the gift. It would no doubt be infructuous and ineffectual in case of non-acceptance by the donee, but

practically the assent of a person may always be presumed to that which is beneficial to him.

The accepted rule of English law is stated by Shephard and Brown in their commentary on the Transfer of Property Act, to be, that "when once the donor has done his part in transferring the property, it vests in the donee, subject only to his dissent. It is not positive consent, but absence of dissent, which is required to make a gift complete and irrevocable."

It should, however, be observed that acceptance by positive consent must be necessary, if the gift be *onerous* or *conditional i.e.*, depending on a condition to be fulfilled by the performance or non-performance of something by the donee.

The Mitákshará school may seem to go further, and to require possession or actual enjoyment by the donee for the completion of acceptance. Since it goes on to say (Mit., on ii, 27),—"As receipt or the like may be made immediately after the bestowal of water (by the donor, accompanying the act of giving,—being the prescribed ceremony for gift,—Text No. 11*a*, *ante* p. 533) on gold, cloth or the like (moveable property), even the threefold acceptance becomes completed. But in the case of a field or the like (land), without the enjoyment of the fruit, corporeal acceptance is not possible, there must be even a slight enjoyment; otherwise, there is no completeness of a gift, sale or the like (transfer). A title without corporeal acceptance consisting of the enjoyment of the fruit (produce) is weaker than a title accompanied by enjoyment. This is so, in the absence of knowledge of the prior or posterior date of the two; in case of knowledge of the prior and the posterior time, the title of the prior date, though defective (in that way), alone prevails."

It should, however, be noticed that in the above passages of the Mitákshará, the subject dealt with is the proof of priority between two persons claiming title to the same property, and the requisites of gift are incidentally discussed, and the question of possession is considered with respect to all kinks of transfer, as a factor determining priority of two titles; and where their chronological priority is not known, there a title created by a gift, sale or the like, when accompanied by possession, is stronger than another title without possession. Where such priority is known, there the title prior in point of time prevails. But this is different from what are required for the completion of a gift as between the donor and the donee.

Transfer of Property Act affects Hindu law as to mode of gift.—According to the definition of Gift in the Transfer of

Property Act, Section 122, the requisites of a valid gift are as follows,—(1) the subject of the gift must be certain existing property, (2) it must be made voluntarily and without consideration and (3) it must be accepted by or on behalf of the donee during the life-time of the donor and while he is still capable of giving: but "if the donee dies before acceptance, the gift is void."

Agreeably to the Transfer of Property Act, a gift may be made to an unborn person, subject to certain conditions: see Sections 13 and 14 corresponding to Sections 100 and 101 of the Succession Act. Hence Section 122 defining gift cannot be taken to mean that the donee must, in all cases, be in existence at the time of gift. Acceptance before death of the donee, therefore, does not imply that the donee is actually in existence when the deed of gift is executed. The Chapter on Gifts, however, does not affect any rule of Hindu or Buddhist law, save as provided by Section 123.

Hence Section 123 which prescribes the mode of effecting a gift, *does* affect the rules of Hindu law on the subject. It says that a gift of immoveable property must be effected by a *registered instrument* signed by or on behalf of the donor, and attested by at least two witnesses. And a gift of moveable property may be effected either by a *registered instrument*, signed by or on behalf of the donor, or by *delivery*.

The Section goes on to say—"Such delivery may be made, in the same way as goods sold may be delivered," that is to say, "by doing anything which has the effect of putting the thing given in the possession of the donee, or of any person authorized to hold them on his behalf": see the Contract Act, Section 90 and the illustrations under it. But with respect to *delivery* for effecting the *sale* of tangible immoveable property of a value less than one hundred rupees, Section 54 says that such "*delivery* takes place when the seller places the buyer, or such person as he directs, in possession of the property." The former relates to moveables, and the latter to immoveables and hence there is this difference between the two cases, as to what constitutes *delivery*.

But as regards the mode of effecting a complete gift by delivery of possession, the rule of Hindu law is changed with respect to both moveable and immoveable property, by Section 123 which provides two alternative modes for moveables, namely, either *delivery* or *registered instrument*; while the latter is the only mode it provides for a gift of immoveable property,

although a *sale* of such property when tangible, and of a value less than one hundred rupees, may be made in either of the two modes as in the case of a gift of moveable property.

It is difficult to understand the principle of the distinction, why possession alone is deemed sufficient for *sale* (section 54) as well as for *mortgage* (section 59), but not for *gift*, of the same property: section 123 of the Transfer of the Property Act.

Practically, however, possession must accompany or follow in the majority of instances of gift of both moveable and immoveable property, although it may not be held as an indispensable requisite for a complete gift: and it is doubtful whether even the Mitákshará school regards possession as the *sine qua non* of a gift, or as a mere factor for determining the priority between two rival transfers of the same property.

Delivery of registered deed, Possession and Registration.—Although according to the provisions of section 123, there cannot be a gift without a registered deed, it does not necessarily follow, that if there be a registered deed of gift, there must be a complete and irrevocable gift. Suppose a person intending to make a gift of a piece of land for residence to a person whom he believed to be a meritorious and virtuous man reduced to poverty for no fault of his own, executes without the latter's knowledge a deed of gift, and causes it to be duly attested and registered, and gets back the document from the Registration office, but in the meantime he discovers that the fellow is addicted to a vicious course of life, and has on account of it squandered his patrimony and is not at all a worthy object of bounty; so he changes his mind, destroys the registered deed, and makes a gift of the same property to another worthy person, by another registered deed in which are recited the facts of the due execution and registration of the first deed, of its not having been acted upon and given effect to, and of its destruction, and delivers the second deed to the donee who is also put in possession.

Surely in such a case the intended donee of the first deed of gift, cannot claim the property by virtue of that deed alone; because the other requisites of gift are wanting. Similarly, a sale also cannot be effected by a registered instrument alone: for, the intention of the executant may be not to transfer the property but only to keep it *benami* in the name of the nominal buyer, with or without his knowledge.

The delivery of the deed to the transferee seems to be necessary for completing the transaction; it would be conclusive evidence of the transferor's intention to do so.

It has already been observed that although delivery of possession affords important evidence of transfer, still under the Hindu law the same was not absolutely necessary for the completion of a gift, if the other ingredients were present. In a case where the donor who was out of possession, did all that lay in his power to do to complete the gift, and acceptance by the donee was proved, the gift was held valid according to Hindu law, as between the donee and the wrong-doer in possession, though the donor could not deliver possession to the donee: 11 I.A., 218. Possession was deemed necessary under the Hindu law as tantamount to acceptance of immoveable property. Hence in the absence of some possession or acceptance, a registered deed alone is held, not sufficient to make the gift complete in a case not governed by the Act: I.L.R., 20 C., 464. Although under the Act, delivery of possession is not necessary in addition to a registered deed of gift, still acceptance is required: I.L.R., 14 C., 446; 23 B., 234. But it should be borne in mind that according to the Bengal school, acceptance by the donee is not necessary, the transfer of property being effected by the donor's act of giving. This doctrine however does not appear to have been brought to the notice of our Courts.

When the law requires a registered deed, it appears to be necessarily implied that not only the execution, but also the registration of the deed should be voluntarily made by the donor; hence a deed of gift registered compulsorily would not be sufficient: I.L.R., 19 M., 433. But it has been held that a deed of gift executed by the donor, but registered at the instance of his widow after his death, is efficacious and valid: I.L.R., 20 A., 392; 25 M., 672. There is, however, an important distinction between the Registration Acts and the Transfer of Property Act with respect to registration. The Registration Acts do not require any transfer to be made by writing; in fact all transactions amongst Hindus could be effected by word of mouth only: all that the Registration law requires is that if certain transfers are made by writings they must be registered within a certain time after execution; hence a transfer may take effect from the date of execution of the document, and not from that of its registration. But the Transfer of Property Act does, for the first time, require that certain trasfers can now be *effected only* by registered instruments, there is no transfer of property, therefore, before registration. The words of section 123 are—"For the purpose of making a gift of immoveable property, the *transfer must be effected* by a registered

instrument." It is clear that there can be no gift *before* registration; the transfer of the property is not effected by the execution of the instrument of gift, *registration* like acceptance, being necessary to complete a gift under this Act; there is no necessary presumption that the executant intended to complete the gift, because he executed the deed. If he did not cause it to be registered when he could, there is rather a presumption in the other way. If those words be construed to be equivalent to—"the transfer must be effected by an instrument which is to be registered," then a gift may be effected by a deed executed by the donor and registered by his legal representative after his death; and then there may also be compulsory registration, if the other requirements are proved to have been complied with. The question is beset with considerable difficulty which is probably sought to be removed by declaring that sections 54, 59, 107 and 123 of the Transfer of Property Act requiring registered instruments for effecting transfers shall be read as supplemental to the Registration Act, (Section 4, Transfer of Property Act); but what is intended is not clear.

G. P. notes.—The recognised mode of transferring government promissory notes and the like, is, by endorsement, hence mere delivery of such property without endorsement is not sufficient to effect a gift. Accordingly a person claiming to hold such notes standing in the name of the donor, as donee by delivery of possession, was held not entitled to the same, the gift being incomplete without endorsement: I.L.R., 12 B., 573; 5 B., 277. But the delivery of such notes to the donee in contemplation of death by the donor, but without endorsement, was held to be sufficient to vest them in the donee and to entitle him to compel the donor's legal representative to endorse the same to him after the donor's death: 6 M.H.C., 270.

Conditional gift & donatio mortis causa.—It has already been observed that conditional gifts are recognised by Hindu law, and it has been held by the Courts that when a gift is otherwise valid it may be accompanied by conditions imposed on the donee, such as performing the worship of the donor's family God, or furnishing maintenance to the donor himself or to any other person.

A gift may be made subject to a condition subsequent, that the property should pass over to another person on the happening or non-happening of some uncertain future event. It is held by the Judicial Committee that a Hindu has power to make a conditional gift of property whether by way of remainder, or by way of executory bequest, upon an event which is to happen, if

at all, immediately on the close of a life in being: *Sreemutty Soorjeemoney Dossee* v. *Deenobundhoo Mullick*, 9 M.I.A., 135. The donee to whom the gift over is made must be alive and capable of taking when the gift speaks, and the gift is to take effect on the death of a person then alive: I.L.R., 9 C., 952.

Under the category of conditional gifts, comes a gift made in contemplation of death, the gift being defeated or revoked on the recovery of the donor. It has been held by the Madras High Court that effect must be given to a gift in contemplation of death, when all the requisites for a valid gift under Hindu law have been fulfilled, namely,—"A giving either orally or by writing with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's life-time." The thing must be proved to have been delivered with the intention of making it the property of the donee from the time of delivery, subject to a conditional right of resumption: 6 M.H.C., 270.

Maintenance grants.—The definition of gift (p. 544) shows that by the donor's act of giving, his ownership in the property given becomes extinguished, accordingly when a Hindu makes a gift by the simple words—"I give this property to you"—he passes to the donee all the interest which he is then capable of passing in the property: hence the donee must be entitled to all the rights of the donor, in the absence of reservation either express or necessarily implied. The rule of Hindu law on this subject is the same as is laid down in the Transfer of Property Act, (Section 8) and the Succession Act (Section 82). This is the modern rule of construction of grants, according to which a grant is construed strongly against the grantor who cannot be said to have intended to retain any rights in the subject matter of the grant unless there be words in the grant itself, expressing or necessarily implying such intention.

When, however, a grant is expressed to be made for the grantee's maintenance, which he requires only for his life, then the grant is presumed to be limited to his life only, unless it is expressed or necessarily implied to be heritable. In the case of *Rameswar Buksh Singh* (28 I.A., 1), it has been held by the Judicial Committee that when a grant for maintenance is made by the holder of an impartible estate to a junior member of a joint family, it is *prima facie* the intention that the gift should be for life. The same view is expressed in the case of *Maharani Beni Pershad Koeri* in the passage—"Their Lordships will not discuss at length the terms of the grant, which

was expressly made in 'lieu of maintenance.' It was, therefore, *prima facie* resumable on the death of the grantee in accordance with the law laid down in the cases cited by the Subordinate Judge." 26 I.A., 216, 220.

In the recent case of *Tituram Mukerjee* v. *Cohen*, the same principle is applied to a maintenance grant made to a junior member, the terms of which were not known: Sir Arthur Wilson in delivering the judgment of the Judicial Committee observes,—"It remained only to say what could be presumed as to the nature of a *khorposh* grant, the existence of which is not disputed, but of the terms of which there is no direct evidence. Both Courts in India held that the most that could be assumed as to the duration of such a grant, was, that it was for the life of the grantee. They further held that such a grant, regarding it as one for the life of the grantee, could not be presumed to be more than a grant of rents and profits, and could not be presumed to carry with it a right to open mines and remove minerals which are a portion of the soil. In these conclusions their Lordships concur." I.L.R., 33 C., 203, 217.

This case lays down an important principle, namely, that when rents and profits only and not the *corpus* of any land are presumed as intended to be assigned, as in the case of a maintenance grant resumable at the grantee's death, (4 M., 193), the assignee is entitled only to the income yielded by the surface of the land and not to the subsoil or underground rights such as those of opening mines and raising coals or other subjacent minerals forming part of the soil whereof the proprietary interest was not transferred to the grantee. The same principle appears to apply to service-tenures in which the usufruct only of the land granted. is intended for enjoyment by the holder of the service in lieu of his remuneration, during the continuance of his service.

But where the members of a junior branch entitled to maintenance have for three generations held lands granted by way of maintenance without any interference on the part of the Zemindar for the time being, either by way of confirmation or revision, the successive enjoyment justifies the presumption that the grant was intended to pass all the interest in the land for the support of the grantee and his heirs in perpetuity: I.L.R., 4 M., 371.

It has already been observed that there are maintenance grants made by the holder of an impartible estate to junior members, and intended to be held by them and their heirs male

in the male line, which are said to be resumable on the indefinite failure of male issue, by the holder of the impartible estate for the time being. But such grants contravene the principle enunciated in the Tagore case, and would involve great deal of hardship and injustice by disturbing the titles of *bona fide* purchasers for value without notice; if they be alienable as they are now held to be, by the Judicial Committee in the case of *Rajah Nursing Deb*, 9 M.I.A., 55, 64-5; see also 22 W.R., 17 and the *Durbhanga Babuana* cases at p. 520 *supra*.

The grant of an estate resumable on indefinite failure of male issue is unknown to Hindu law. They may be recognised as assignments of the rents and profits only and not of the land itself, intended for enjoyment succcessively by the grantee and his heirs male in the male line for their lives, the grant being confirmed, as it were, after the death of each life-tenant, to his heirs male. If such resumable maintenance grants be recognised as valid, then they should, as has already been said, be held *inalienable* as being an interest in property restricted in its enjoyment to the grantee and his heirs male personally, and as such cannot be transferred by any of them, according to the principle laid down in the Transfer of Property Act, Section 6, clause (*d*). This would offend the English Law's abhorrence of inalienability of property, but it appears to be the only view consistent with the principles of the Mitákshará Law of joint families and impartible estates. In one case it has been held that a maintenance grant may be heritable, but not necessarily alienable: *Bhaya Dirguj Deo* v. *Pande Fateh Bahadur*, 3 L.J., 521.

Gifts to females.—When grants made to females and specially to widows appear to be intended as provisions for their maintenance, then a presumption arises in favour of their construction as conveying life-estates only, unless there be distinct words to show that the interest given is heritable and alienable. Such a construction is undoubtedly consistent with the ordinary ideas and wishes of Hindus who do not desire their estate to pass out of their family. Accordingly, grants to women have been held to create only life-interest though the grantee may be declared to become "heir and *malik*" (2 I.A., 7, 14) or "owner" (I.L.R., 17 B., 503) or "owner" just as the grantor is owner, (I.L.R., 21 B., 376; 19 A., 16). See also *Radha* v. *Rani*, 35 I.A., 118.

There is not, however, any general rule of Hindu law that a disposition in favour of females creates only a limited interest, such as they have in property inherited from a male relation according to the Bengal school. But there is a special rule

applicable to a gift by a Hindu husband to his wife, of *immoveable* property which she is not entitled to alienate, which therefore cannot constitute her *Stridhan* property according to its definition: D.B., 4, 1, 18. But even in her case it has been held that if a testator intends to give an absolute estate to his widow she is entitled to the same: 24 W.R., 395; *Mt. Surja* v. *Rabi*, 35 I.A., 17 = 30 A., 84. But in construing deeds and wills whereby *immoveable* property is given by a husband to his wife, the special rule of Hindu law is not referred to in all cases; this circumstance explains why similar words are construed by different courts to have different effects. Accordingly in the case of *Mussamut Surjamani*, a deed of gift to the donor's two widows and a daughter-in-law, declaring that they shall be as *malik wa khud ikhtiyar*, *i.e.*, "owners with proprietory powers"—is held to convey a heritable and transferable estate; but similar words were held to have a different effect in the cases at the end of the first paragraph of this topic. But see pp. 458-9 *ante*.

As regards women other than the grantor's wife, although there is no rule restricting their rights in the property conveyed to them, still in the absence of words indicating the transfer of a heritable and alienable interest, a grant appearing to be made as a provision for maintenance, which the grantor is bound to make, may be taken to confer only a life-interest, as has already been stated: I.L.R., 22 M., 357. But otherwise, words sufficient to pass an absolute estate if the gift were made to a man, will confer the same estate on a woman: I.L.R., 24 C., 406. Accordingly, a deed of gift by a Hindu to his sister to the effect that she shall enjoy for life, and on her death her husband, sons, grandsons and other heirs shall continue to enjoy and possess in succession and shall have power to give or sell,—is held to confer an estate of inheritance, though the heirs were enumerated in improper order: *Basanta* v. *Kamikshya*, 33 C., 23. And where a testator made a gift to his wife and son in the following terms,—"The remaining 4 Annas I give to you and the son born of your womb for your maintenance"—and then declared his intentions with respect to their respective interests under the gift, in the following words,—"upon my death you and your sons and grandsons, &c., in due order of succession shall hold possession of the Zemindari. And I give to you the power of making alienation by sale or gift."—It has been held that on a true construction of the gift each took an absolute interest in a 2 anna share, and the words "for your maintenance"—did not reduce the interest of either to one for life only: *Jogeswar* v. *Ramchund*, 23 I.A., 37.

In this case it was contended that the mother and son took as joint-tenants and not as tenants-in-common. But their Lordships rejected this contention holding that that extremely technical rule of English conveyancing ought not to be imported into the construction of a Hindu will, the principle of joint tenancy being unknown to Hindu law, excepting in the case of co-parcenary between the members of a Mitákshará undivided family.

Universal donation.—According to Hindu law a person having male issue cannot make a gift of his whole property. A Hindu is bound to provide maintenance for his male descendants, and his wife and parents. Their maintenance appears to be a legal charge on his property. The universal donee, therefore, appears to be liable not only to pay the donor's debts but also to meet the donor's obligation to furnish maintenance to the donor's wife (I.L.R., 2 A., 315) and the like, to the extent of the property.

Donee must be in existence.—It has been held by our Courts that the donee must be in existence at the time when the gift speaks. This doctrine is laid down for the first time in the Tagore case, in which their Lordships hold that a Hindu cannot make a gift in favour of a person who is not in existence either in fact or in contemplation of law at the time when the gift is to take effect: 18 W.R., 359.

Doctrine not supported by Dayabhaga.—There appears to be some misconception with respect to the meaning of a phrase of the Dáyabhága which is mistaken to support this doctrine as appears from the following passage in the judgment of that case—"It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Dáyabhága, chapter i, v, 21, by the phrase 'relinquishment in favour of the donee who is a sentient person'": 18 W.R., 367.

The misconception appears to be due to mistranslation. The whole sentence in the original, of which the *phrase* forms a part is as follows,—दाने हि चेतनोद्दे श-विशिष्टत्यागादेव दातृव्यापारात् सम्प्रदानस्य द्रव्ये स्वामित्वम्—of which the following is the correct translation,—"since in a gift the donee's ownership in the thing (given) arises from the very act of the donor, consisting of the relinquishment of his ownership with the intention of passing the same to a sentient being."

The phrase does neither express nor imply that the "sentient being" must be in existence, or be present, at the time and place

of the relinquishment; nor does the term *sentient being* mean a human being only, as it may include lower animals, but it excludes inanimate objects. On the contrary, the whole argument contained in paragraphs 21—24, (mistaken to be verses) of chapter i, of the Dáyabhága, including the said sentence containing the phrase, shows that as a gift is completed by the donor's act alone, acceptance by the donee being not necessary at all, therefore it follows that the existence of the donee cannot be held necessary according to the Bengal school.

It has already been observed that it is not correct to say that there is no distinction between the ancestral and the self-acquired property in the Bengal school, as regards the father's rights over them. One of the rules applicable only to ancestral property is, that the same cannot be unequally distributed by the father, nor can a partition of the same be made by the father until and unless the mother be passed child-bearing, inasmuch as all the grandsons born and-to-be born are entitled to the same; and if it be partitioned, and subsequently other sons are born, they are entitled to take their shares from what has already been allotted to their brothers contrary to the said rule. This throws considerable light on the subject of provisions for unborn persons. For, if *Rai Bishenchand's case* were governed by the Bengal school, then the unborn persons could claim to get, what was given to them by the deed under the law laid down in the Dáyabhága, ch. vii, paras. 10-13: 11 I.A., 164.

Gifts to unborn persons.—The numerous religious and charitable endowments of the Hindus prove that gifts for the benefit of unborn persons are recognised. And this is admitted in the Tagore case in which their Lordships observe,—"and in cases of a provision for charity or for other beneficient objects, such as the professorship provided for by the will under consideration, where no estate is conferred upon the beneficiaries and their interest is in the proceeds of the property the creation of a trust is practically necessary": 18 W.R., 359, 368.

Their Lordships virtually lay down that the rules against perpetuity and remoteness do not apply to devises for the benefit of the public, as is provided in the Transfer of Property Act, Section 17, with respect to transfers *inter vivos*. The rules are intended to operate only to prevent the tying up of property in the transferor's family or descendants.

Gifts for religious, charitable, educational, or the like beneficent objects may be made by a Hindu for the benefit of both born and unborn persons, or those that are in existence as well

as those that are to come into existence in future. It would not, therefore, be right to say that a Hindu is absolutely incompetent to make a gift in favour of an unborn person. The text No. 12 (p. 533 *supra*) embodying the declaration by an owner, dedicating a consecrated tank to his existing and future relations as well as to all animate beings, affords evidence of a gift to unborn persons; the donor continues to hold the property as trustee on behalf of the beneficiaries including himself. The intervention of a trustee does not affect the question: the beneficiaries are the really interested parties, and the trustee occupies the position of a mere holder of the property, for applying the property or its income, so as to secure the benefit intended to be conferred on the persons really interested.

It is, however, a well-known doctrine of Hindu law that no property can be without an owner; but this does not militate against a disposition creating present and future interests in the same property in favour of existing and unborn persons respectively, so that there is always an owner to hold the property though not a full owner.

Although there is no authority in Hindu law to justify the doctrine that a Hindu cannot make a gift for the benefit of an *unborn* person, yet that doctrine has been engrafted on Hindu law as a settled rule of it by the decisions of the highest tribunal. And although exceptions to this, appear to be admitted, in favour of certain persons not in actual existence but deemed to be in existence in contemplation of law, and in favour of gifts for the benefit of the public including persons that are to come into existence in future, yet the extension to the wills of Hindus, by the Hindu Wills Act, of sections 99, 100 & 101 of the Indian Succession Act laying down the conditions subject to which gifts to unborn persons are permitted, has been held to be inoperative and ineffectual, upon the ground that as Hindus had no power to create and interest in property in fovour of unborn persons before the Hindu Wills Act came into operation, and the last clause of Section 3 of that Act says that nothing contained in that Act shall authorise any Hindu to create such interest in property, therefore the said Sections 99, 100 and 101 are inapplicable to wills executed by Hindus after the Act.

This construction of the Hindu Wills Act appears to be opposed to the general principle of construction, according to which the provisions of a statute should not be so construed as to render one provision inconsistent with another. It does not seem to be reasonable to presume that the Legislature has

committed a serious error by permitting in one part, what is absolutely prohibited in other part, of the same Act.

On the contrary it may as well be held according to a well-known rule of construction adopted also by Hindu commentators to reconcile conflicting texts, that the prohibition contained in the said Section 3, is intended to apply to cases other than those coming under Sections 99, 100 and 101 of the Succession Act. Besides, it does not seem to be impossible to reconcile the two provisions, inasmuch as even according to the exposition of the Hindu law of Gift in the Tagore case, a Hindu is not absolutely prohibited to create interests in property in favour of unborn persons; for, exceptions are recognised, the gift for establishing the Tagore Law Professorship in the very will under consideration of the Court in that case, being held valid. The distinction drawn between "estate" in property and "interest in the proceeds of the property" as regards capacity to make a gift for the benefit of unborn persons, is one, that does not seem to affect the capacity of the donor and the donee to give and take respectively; but it only affects the character of gifts, and is really a distinction between unborn beneficiaries taking as specified individuals or taking as members of the public; what has been held is that there is capacity in latter case but not in the former. This distinction, however, is not recognised by the Hindu law. There is no cogent reason why the privilege of making gift subject to the restrictions imposed by Sections 99, 100 and 101, be denied to the Hindus.

It is felt as a great hardship and grievance by the Hindu that they are deprived of the right of making family arrangements that perfectly are deemed,—reasonable a right which is also expressly conferred on them by the Legislature. It seems desirable that the question should be reconsidered by the Judicial Committee and the Hindus would be grateful if the view taken by justice Wilson in the case of *Alangamanjari* right reconciliation of the sections seeming to be inconsistent, construing the Hindu Wills Act according to the principle acted upon by the Judicial Committee in *Narendro Nath Sirkar's* case (23 I. A., 18) and enunciated in the well-known case of *Bank of England* v. *Vagliano*, with respect to the proper mode of dealing with an Act intended to codify a particular branch of the law, in other words, without being influenced by previous decisions.

Gift to a class.—As logical consequence of the doctrine that a gift to an unborn person is invald, it was broadly laid down in some cases that where there is a gift to some persons who are

in existence and to others who are not in existence at the time when the gift is to take effect, as a class, the gift is wholly void: *Soudaminey*, v. *Jogesh*, I.L.R., 2 C., 262; *Kherodemoney* v. *Doorgamoney*, 4 C., 455.

But later decisions have restricted the operation of the rule, having regard to the principle upon which it is founded. The principle being that when the donor intends to confer a benefit equally on all the members of a class, it is difficult to say what his intention would have been had he known the incapacity of an unborn person to take; hence the gift fails in its entirety, no benefit being derived by the members in existence.

The difficulty, however, is not one which is insurmountable in all cases; for, intention being the sole principle, test or guide, it may appear that the donor had two-fold intention in making a disposition to a class, namely, a primary and a secondary intention. If it is manifest from the language of the document that the donor had the primary intention to confer a benefit on certain existing persons, and also a secondary intention to make unborn persons forming with them a class, participators of the same benefit as their co-sharers; or that the donor had the primary intention to benefit equally all members of the class and also a secondary intention to benefit the existing members; in either case the intention to benefit those members of the class that exist at the time when the gift takes effect, may be given effect to, although the intention to benefit the whole class fails, should there be no other objection to such a construction.

The leading case on the subject is that of *Rai Bishen Chand* v. *Mussamut Asmaida Koer*, (11 I.A., 164 = I.L.R., 6 A., 560) in which a Mitáksharâ joint family consisted of a father, a son, and a minor grandson; the son was extravagant and the father had to liquidate the son's personal debts several times, the aggregate of which together with a sum of Rs. 5111 represented the value of the share the son would get on partition. With the paramount intention to get rid of the son, Rs. 5111 was paid to him to which sum he was a equitably entitled in addition to the amount already paid to his creditors out of the joint state, as his share on partition, and a deed of family arrangement was executed by the father with the consent of the son, settling the family property subject to certain charges for maintenance, on the next generation represented by the minor grandson in these words,—"*Babu Satrujit* the minor himself and his own brothers who may be born hereafter, are and will be the permanent and rightful owners and claimants of all the ancestral properties

&c.," and immediate effect was given to the deed by putting the minor in possession of the properties through his guardian and mother the Respondent, and by causing the minor's name to be registered as proprietor in the Collector's records by expunging the name of the executant, and by allowing the Respondent to manage the entire estate on behalf of the minor, and after the minor's death shortly after, on her own behalf as the heir of her minor son.

A creditor of the son impeached the deed as being a fraud on his creditors, and also invalid as being an illegal gift to unborn persons. The deed was held to be a *bona fide* family arrangement partaking the character of a partition in so far as the son was concerned, who received the value of his interest in the family state, and was thenceforth totally excluded,—whereby the executant surrendered his interest to his grandson who on a complete partition would be entitled to one-fourth.

The intention is clearly expressed for the immediate vesting of the whole property in the existing grandson. He becomes the proprietor of the whole property and must continue to be so, if no brother is born to him, so that upon the whole document the intention was clear to benefit the existing grandson, there was also an intention to benefit his brothers if born subsequently; one may be called the primary, and the other the secondary, intention.

With respect to the construction of the deed, the Judicial Committee made the following important observations, (p. 178), —"Cases are not rare in which a Court of construction, finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely. In the present case, there is every reason for holding that, if *Satrujit's* possible brothers are not able to take by virtue of the gift, he shall take the whole. He is there present, and able to receive the gift. He is an individual designated in the deed. If the deed stood alone, it is a question in each case whether a designated person who is coupled with a class described in general terms is merged into that class or not. But the deed does not stand alone. It is followed by actions of a kind which, even without a deed, may work a transfer of property in *India. Satrujit* is entered in the Collector's books as the sole possessor of the property, and his guardian takes possession, first in his name, and afterwards as his successor. Their Lordships hold that the circumstance that the parties wished to do something beyond their legal

power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed, and is clearly proved from the transfer of the property in fact."

The application of the doctrine of *cy pres*, or of the doctrine of paramount intention and approximation, to this case is determined by the facts that a *persona designata* who is intended to get the property at all events, namely, in whole in one event, or in part in the opposite event, gets the whole property immediately as his own by divesting the donor, and is only intended to be partially divested in case an uncertain future event happens; he cannot, therefore, be merged into the class, and so be deprived altogether of the property, contrary to the clear intention in his favour.

There is one aspect, however, of this case, which may give a different complexion to the transaction, but that is not the ground of the decision, namely, that the three members being joint-tenants, the transaction may be looked upon as a surrender by the father and the s.. of their undivided co-parcenary interests, and the recital of the rights of the unborn grandsons may be looked upon as merely a statement of what, they contemplated, was to take place according to the ordinary Mitákshará law itself, which recognises the male issue's right by birth to ancestral property.

The ground of decision in this case is thus explained by Justice Wilson,—"The true ground of decision in that case appears to me to be that in construing family settlements of this nature, Courts are to ascertain the real meaning of the parties to the transaction; that when that meaning has been ascertained, if it appears that the whole plan cannot be carried out, but that a part of it can, effect is to be given to that part. And that, accordingly, if the plan be to give a present gift to persons capable of taking, that gift is effectual, although it was also intended that other persons, incapable of taking, should afterwards come in and share in the gift."—*Ram Lal Sett* v. *Kanai Lal Sett*, I.L.R., 12 C., 663, 676.

Ram Lal Sett's Case.—The next in importance is the case of *Ram Lal Sett* v. *Kanai Lal Sett*, (I.L.R., 12 C., 663), in which Justice Wilson delivered a very learned, elaborate, instructive and lucid judgment which every student of law should carefully read. In this case the facts were similar to those of *Bishen Chand's* case: a Hindu governed by the Bengal School executed a deed whereby he made a gift *inter vivos* in these words,—"I

make a gift of the said two parcels of land to Sriman Ram Lal and Sham Lal Sett the two now existing sons of my youngest son, and to the sons to be born unto him in future &c." And then the deed goes on embodying several directions and terms. The donor's intention appearing from the deed is stated in the judgment, thus,—"He intended, I think, that he should at once cease to have himself any interest in the property given; that the two living grandsons should at once enter upon the possession and enjoyment of it, and acquire the right to dispose of it; that if brothers should afterwards be born, each of such brothers should at his birth step into an equal share of the property, but without any retrospective effect; and that no act of the living grandsons should prejudice this right of their after-born brothers, and that during the minority of the living grandsons their mother should manage the property for their benefit without being liable to account to them." His Lordship introduced the above statement by saying that he would state the intention without the use of technical words and in popular language, and therefore it is added,—"Expressing this in more technical language, I think he meant to give the two living grandsons a present title to, and the present possession and enjoyment of, the property, but that their title was liable to be partially divested in favour of after-born brothers. This intention seems to me to be sufficiently expressed in the instrument of gift, and in this case, as in that before the Privy Council (*Bishen Chand's* case) the conduct of the parties makes the intention clear." (p. 676-7).

The gift to the two living grandsons was for the foregoing reasons held good. With respects to gifts to a class an important distinction is pointed out by his Lordship, thus,—"There is, undoubtedly, a difference between a present gift to persons capable of taking, which is intended afterwards to open and let in others not capable of taking, and a future gift to a class, which may or must include both classes, all of whom are intended to take at the same time. The late decision of the Privy Council (in *Bishen Chand's* case) has not, therefore, I think, necessarily overruled *Soudaminey's* case," which "related to a gift, contingent at the testator's death, to a class of persons to be ascertained at a future date. It was a gift to such lawful male issue as might be living at the death of any of the testator's sons or grandsons who took life estates."

The result of the English decisions on gifts to a class, is shortly stated by his Lordship (p. 679) thus,—"In dealing with a gift to a class you enquire first, at what period the class is to

be ascertained—it may in a case of a will be on the death of the testator or at a later period. If the class is to be ascertained on the death of the testator, no question of remoteness can arise, and the general rule is that the gift takes effect in favour of such of the class as are then capable of taking. If the ascertainment of the class is deferred to a later date, those who become members of the class within the extended period are admitted; and subject to any question of remoteness those who are thus capable of taking, take. In either case, if any members of the class are incapable of taking because born after the date of ascertainment, they are simply excluded, and the rest take the whole; and this is so, even if the gift be to persons born and to be born. If any die in the testator's life-time they are simply excluded, and the rest take the whole. If the gift to one is revoked by codicil, he is simply excluded, and the rest take the whole. If one is incapacitated from taking because he has attested the will, he is simply excluded, and the rest take the whole."— English cases are cited in support of each of these propositions, they are omitted here; see p. 680.

Justice Wilson's conclusion on gifts to a class.—Having discussed the cases of *Soorjeemoney* (6 M.I.A., 526 and 9 M.I.A., 123), and *Kherodemoney*, and *Soudaminey*, his Lordship dissents from the view expressed in the last two cases, and states his conclusion as follows,—"For these reasons I should be prepared, if necessary, to dissent wholly from the doctrine laid down in those cases, and to hold, as *the general rule*, that where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of gift or the death of the testator, as the case may be, and where *there is no other objection* to the gift, it should enure for the benefit of those members of the class who are capable of taking. I think the late decision of the Privy Council is a direct authority for so holding, where *the intention is*, as I think it was in this case, *to give a present gift* to those of the class who are capable of taking."—p. 685.

It should be noticed that the general rule appears to be qualified by his Lordship in its application, by the two conditions indicated by the words italicized by me.

This rule have been followed by the High Courts in subsequent cases the most recent of which is decided by a special Bench of five learned Judges including the Chief Justice of the Calcutta High Court: in which all the other cases are cited: *Bhagabati Barmanya* v. *Kalicharan Singh*, I.L.R., 32 C., 992.

In the judgment of this case it is observed,—"There is no rule of Hindu law, to the effect that a gift *inter vivos*, or a bequest, to a class of persons some of whom are incapable of taking by reason of the rule that the gift is valid only if it is made to a sentient being capable of taking, is void also as regards those who are sentient and capable of taking": p. 1009.

In this case is cited the following passage from the English case—*In re Coleman and Jarrom* (4 Ch. D., 165),—"Now I (Sir George Jessel) think there is a convenient mode of interpreting the testator's intention, and it is this. The testator may be considered to have a primary and secondary intention. His primary intention is that all members of the class shall take, and his secondary intention is that, if all cannot take, those who can shall do so. Both intentions co-exist and are frequently exemplified."—p. 1012.

In the conclusion of this case it is stated that the testator's primary intention may be taken to benefit all the members of the class, born and unborn; but as those actually born were the immediate objects of his affection and bounty, the primary intention may also be taken to benefit them, though they were not named: at any rate, if not his primary intention, his secondary intention was that at least those who were capable of taking shall take.

In some of the cases the general rule is rather too broadly enunciated, as if in every case the two-fold intention is to be presumed. It should, however be borne in mind that the rule in *Leake* v. *Robinson* (2 Mer., 363) is not a technical or unreasonable one, or such as cannot reasonably be applied to any case. There is undoubtedly a difficulty which cannot in all cases be obviated by the application of the rule of *cy pres* or approximation. Consequently, the rule must be applied should there be nothing in the will justifying the Court in attributing to the testator an intention that those in existence should take in any event: *Khimji* v. *Morarji*, I.L.R., 22 B., 533.

Gift to one of a series of persons.—Analogous to the gift to a class is the gift to one of a series of persons, who may not be in existence when the gift speaks, that is, at the date of the gift in the case of a deed, and in the case of a will at the death of the Hindu testator; as for instance, a gift over to the heir of the donor or of a specified individual, existing at the time the gift is to take effect. The English case of *Dungannon* v. *Smith* (12 Cl. and F., 546) is an authority for the proposition that a gift over to the heir of a person, which is to take effect at a

future time if a condition subsequent be fulfilled, is bad, being tainted with the vice of remoteness, inasmuch as the heir to take may be a person who is not capable of taking by reason of the vesting being delayed beyond the period allowed by law. This rule, however, was not followed by the Calcutta High Court in a case in which a Hindu made a gift over to his heir, upon the ground that the sister's son who was to take as the heir was in existence at the time when the will was made, and when the testator died: *Bhobatarini Debya* v. *Peary Lall Sanyal*, I.L.R., 24 C., 646. It is pointed out by their Lordships that the decision in the English case follows a rule of English law settled by a long series of decisions in which it was held that a bequest is void for remoteness unless it necessarily vests within the time allowed by law for delaying vesting. But there is no similar rule here.

Possible not actual events.—There is another very important rule of English law relating to the question whether a gift is tainted with the vice of remoteness, or offends against the rule of perpetuity: the rule says,—"In deciding the question of remoteness, it is an invariable principle that regard is had to possible and not to actual events; and the fact that the gift might have included objects too remote, is fatal to its validity." You are not to wait for actual events, but you are to construe a deed and a will by having regard to possible future events.

The Indian Succession Act appears to have adopted the English rule, but with a difference as to the period to which the vesting can be delayed: for, the period according to English law consists of the lifetime of a person or persons living at the testator's decease, *plus* the absolute term of twenty-one years; but according to the section 101 of this Act the period consists of the lifetime of a person or persons living at the testator's death *plus* the *minority* of the unborn person who must come into existence before the death of the living person or persons. So under the Indian law, it is an indefinite period varying practically from the lifetime only of living person or persons, to the said lifetime *plus* eighteen years and also the period of gestation, according to the date when the unborn person comes into existence in fact or in contemplation of law. The language of section 101 is as follows,—"No bequest is valid whereby the vesting of the thing bequeathed *may* be delayed beyond" the said period, and so it clearly implies that regard should be had to possible events.

Section 14 of the Transfer of Property Act embodies the same rule; but its language is somewhat different; it is as

follows,—"No transfer of property can operate to create an interest which *is to take effect* after" the said period. It seems to indicate that the *actual* event determines the validity of a transfer *inter vivos*.

According to the decisions of our Courts neither of these two sections are applicable to Hindus who have been held to be incompetent to make a gift to an unborn person.

But subject to this distinction, this rule has been held to apply to cases of Hindu Wills, upon the ground that "the rule is not a rule of the strict English Common Law" but that—"The rule was established, in fact, as founded on reason and convenience:" *Soudaminey* v. *Joges Chunder*, I.L.R., 2 C., 262, 268-9. Accordingly, a gift over to the male issue of the testator's sons was held void for remoteness as the class *might* include persons not in existence at the death of the testator. Similarly, a gift over to the testator's nearest *sapinda gnyáti* was pronounced invalid, since he might not be in existence at the death of the testator, and since—"In a gift of this kind, regard is had to possible and not to actual events": *Ramguttee* v. *Kisto Sooonduree*, 20 W.R., 472. In this case there was no finding whether the person claiming to take as the nearest *Sapinda Gnyáti* was alive at the testator's death, the same being held unnecessary.

But a rule which may be perfectly reasonable and convenient in England where the object of the gift may come into existence after the death of the testator and before the expiration of the absolute term of eighteen years from the death of a person living at the testator's decease, cannot be held to be applicable to the Wills of Hindus who are held incapable of making gifts to any unborn persons. If in England a gift made to an unborn person is neither unreasonable nor inconvenient should he come into existence within the said time, and the vesting be not delayed beyond the period allowed by law, why should then a gift over made by a Hindu to one of a series of persons, be held invalid by the introduction of this English rule, when the person actually to take the gift is to be ascertained on the happening of an uncertain future event which must happen, if it happens at all, within the lifetime of a living person, and the person is otherwise capable of taking, being alive at the testator's decease? Accordingly, it has, as noticed above, been held by Justices Banerji and Rampini, that a gift over to the testator's *heir* in case his widow should cease to reside in his dwelling-house, is valid under the Hindu law, where the heir claiming the gift

was alive at the date of the will and the death of the testator: I.L.R., 24 C., 646.

Priority among transfers of the same property.—The rule of Hindu law on the subject of priority among successive transactions, and among successive transfers of the same property in favour of different persons, is contained in the following sloka of Yájnavalkya, (ii, 23),—

सर्व्वेष्वर्थ-विवादेषु बलवत्युत्तरा क्रिया ।
आधौ प्रतिग्रहे क्रीते पूर्व्वा तु बलवत्तरा ॥ २, २३ ।

which means,—"In all disputes relating to property the posterior transaction prevails; but in the case of a mortgage, a gift, or a sale, the prior transaction prevails":—Yájnavalkya, 2, 23.

Two rules are laid down in this text relating to priority among two or more transactions relating to property. The first rule which is put as the general one, and according to which a later transaction is to prevail over an earlier one, is applicable to all cases other than those covered by the second rule which is stated by way of exception to the former. The first rule appears to apply to successive transactions between the same parties with respect to property, of the nature of contracts such as a contract of debt, in which the latest transaction is to be taken to represent their ultimate agreement in supersession of the earlier ones.

The second rule, according to which a prior transaction is to prevail against subsequent ones, applies to successive transfers by mortgage, gift or sale, of the same property to different persons. This rule appears to be substantially the same as is laid down in Section 48 of the Succession Act, barring however the qualifications restricting the operation of the rule.

It should be noticed that the application of this rule of priority depends upon the fact that one of the transfers was earlier than the other. But, as under the Hindu law, all transfers of property could be, and were often, made by word of mouth only, the possession of the disputed property by a transferee was necessarily under that law regarded as a very important circumstance, and was allowed to have the effect of determining priority, when it could not be ascertained which of the two oral transfers was prior in point of time, and in consequence the rule could not be applied for determining priority.

Notwithstanding the rule of Hindu law permitting transfers by word of mouth only, all important transactions came to be

effected by Hindus in practice by means of writing; but the rule continued to exist in theory, and also in practice in backward districts, until the same has been altered by the Transfer of Property Act as regards sales (s. 54), mortgages (s. 59), leases (s. 107), exchanges (s. 118), and gifts (s. 123), of immoveable property, with a few exceptions.

But sales of tangible immoveable property of a value less than one hundred rupees, and mortgages of immoveable property where the principal money secured is less than one hundred rupees, and also leases other than those from year to year or for any term exceeding one year or reserving a yearly rent, may even now be effected by delivery of the property *i.e.*, by putting the transferee in possession of the property.

In a case of competition between two successive deeds relating to rights to, or interest in, the same immoveable property, one of which is unregistered and the other registered, the registered deed is declared by section 50 of the Indian Registration Act (No. III of 1877) to take effect against the unregistered one, even if the latter be anterior to the former. A student of law at first feels some difficulty in understanding the propriety of this rule, as also the principle on which it is founded. For, if the law allows a sale or gift to be made by an unregistered document, how can the transferor who has already passed whatever interest he had in the property to the transferee by the unregistered deed, and who has therefore ceased to be owner of the property, create any right in favour of another person by executing a registered deed, when he himself has no right whatever in the property? It is sought to be explained by saying that the effect of the rule is to declare a transfer by an unregistored instrument to be a fraud on the subsequent purchaser by a registered deed. Practically, however, the Section seems to legalise fraud, inasmuch as the effect of the rule was to defraud of their just rights, innocent transferees for value ignorant of the peculiar law invalidating transfers permitted by itself, by allowing subsequent fraudulent transactions to prevail.

The evil effect of this rule was considerably reduced by the introduction of the doctrine of notice, which our Courts as Courts of Equity could not but introduce and engraft on the Section. The transferor in such a case is undoubtedly guilty of fraud, and if the subsequent transferee takes a registered deed of transfer, knowing that the property has already been transferred to another person by an unregistered deed, he becomes a party to the fraud; and as no person can be permitted by a

Court of Equity to derive any advantage from his own fraud, he is held to be not entitled to claim property under the said Section 50; *Narain v. Dataram*, I.L.R., 8 C., 597.

But this fraud can no longer be perpetrated with respect to sales, mortgages, and leases of immoveable property, inasmuch as such transfers cannot now be effected by unregistered instruments. These transfers can, under the present law, be effected only by registered deeds, except in a few instances set forth above, in which they may also be effected by the alternative mode of delivering the property, or oral agreement accompanied or followed by delivery of possession.

And it has been laid down in Section 48 of the Registration Act, that a registered deed relating to any property cannot take effect against any oral agreement or declaration relating to such property where the agreement or declaration has been accompanied or followed by delivery of possession.

A prior mortgage, however, loses priority, if through his fraud, misrepresentation or gross neglect, another person is induced to advance money on the security of the mortgaged property, and accordingly it is laid down in Section 78 of the Transfer of Property Act that in such a case the prior mortgage shall be postponed to the subsequent mortgage.

Wills.

Wills unknown.—Wills were unknown to the Hindus, and in fact, they appear to be opposed to the spirit of Hindu law. The joint family system is the normal condition of Hindu society and the original theory of property in land was, and to a great extent still is, that it belongs to the family and not to its individual members:—the *family* is an ideal entity composed of its past, present and future members connected lineally and collaterally through the male lines of ascent and descent,—and landed property forms the hereditary source of the family fund, and is held in trust by the members in successive charge of it, for the spiritual and temporal benefit of all the members whether deceased, or existing or to-be-born afterwards. It appears that at first neither alienation nor partition was allowed of the land itself, notwithstanding the separation of the members in mess. And although in the course of time, the original state of the family has changed, and partition is allowed, and individual rights are recognised, still so long as the family continues joint no alienation of his interest in the joint property could be made by a member for his personal purposes, according

to the Mitákshará school; and even in the Bengal school, restrictions are imposed by the Dáyabhága on the power of alienation as regards *ancestral* property. The Mitákshará law on this point has, however, been modified by the Courts to a certain extent, and the Dáyabhága law with respect to a father's power of alienation over ancestral immoveable property has been misunderstood, by reason of an erroneous application of the doctrine of *Factum valet.*

It should be noticed that the law of succession and inheritance is believed by Hindus to be founded on divine ordinance; it would therefore be irreligious to disturb the divine rule of devolution of property by disposing of it in a different manner; hence Wills executed in contemplation of death, and containing dispositions of property contrary to the divine law of inheritance, were not likely to commend themselves to the Hindu ideas and sentiments that were more religious than secular.

Besides, under the Hindu law, the proprietory right of a person is extinguished by his death; post-mortem dispositions of property by a Will would be in direct conflict with this doctrine, and it would be difficult to reconcile them, except by the introduction of some fiction.

Adoption—or the affiliation of a son and appointment of an heir, takes the place of Will in Hindu law. An *Anumati-patra* or deed authorizing the executant's wife to make a posthumous adoption bears a close resemblance to a Will, although it is not admitted to operate as a testamentary disposition, since it has been held that the son adopted by a widow takes the adoptive father's estate, not by devise but by descent: 12 M.I.A., 279. According to Hindu law, the husband and wife form one person, and the deceased husband is deemed to live in the wife who is regarded as the surviving half of the husband: hence in an adoption by the widow, it is the deceased husband who is taken to act through his *widowed wife*, (= विधवा पत्नी—expressive of the Hindu idea of the relation), she is the instrument through whom the husband himself is supposed to act. Likewise, a Hindu widow seems to be competent to make a disposition of property appertaining to her husband's estate in her hands, if she was directed in that behalf, by the husband who himself intended to do the same, but was accidently unable to carry out his intention.

Hindu Wills recognised.—Wills made by Hindus came to be recognised by the English lawyers connected with the old Superior Courts as Judges, Advocates and Solicitors, as a matter of

course. It was quite natural for them to assume that Hindus had the power of making testamentary disposition of heritable property owned by them, of which they could make alienations *inter vivos*, the power being taken as an ordinary incident of ownership. The Legislature also made the same assumption in the Regulations relating to the devolution of the Zemindaris, i.e., the most valuable interests in land created by the Permanent Settlement of 1793 A.D. wherby the hereditary Collectors of land-revenue in Bengal, Behar and Orissa, were converted into proprietors. As these offices, though permitted to be heritable, were indivisible, it became necessary to declare that the Zemindaris which were converted into property of the Malguzars who used before to collect the revenue thereof,—were to be subject to the ordinary law of inheritance like other properties, and were no longer liable to devolve entire to the eldest son alone. Accordingly, Reg. XI of 1793 was passed, of which section 2 says,—"If any Zemindar shall die *without a Will*, or without having declared by a writing, or verbally, to whom and in what manner his landed property is to devolve after his demise, and shall leave two or more heirs, who by Hindu law may be respectively entitled to succeed to portions of the landed property of the deceased, such persons shall succeed to the shares to which they may be so entitled." Similarly, Regulation X of 1800 which was passed by way of exception to the preceding Regulation, declared that certain estates which had been impartible, and succesion to which used invariably to devolve to a single heir, by long established custom, shall continue to devolve to a single heir to the exclusion of the other heirs, *if the proprietor die intestate*. There are several other Regulations and Acts in which testamentary power is recognised: see Reg. V of 1799 and Oudh Talukdurs act No. 1 of 1868.

The Regulations of the eighteenth century, creating the Zemindaris that have become the most important and valuable landed estates in this country, and declaring their incidents, did practically confer the testamentary power on the Zemindars, though in an implied and indirect manner. The Zemindars were awere of the contents of the English Regulations through translations made for their benefit, into the language understood by them, and did not fail to take advantage of the power so given by exercising the same.

The Mahomedan law recognises testamentary power with respect to one third only of a person's estate; for, it recognises as indefeasible, the claim of the descendants as well as of the

ascendants upon a deceased person's estate to the extent of two-thirds of it, but subject to the payment of debts and other dues. And although a Mahomedan is competent to make a *gift* of his whole property by a transfer *inter vivos*, he is not permitted to deprive by a Will his legal heirs of their legitimate shares in his estate beyond the extent of a third of it, except by their consent. Although the Mahomedans ruled India for many centuries, still the Islamic law could not make any impression on the Hindu mind, inasmuch as the law of both Hindus and Mahomedans being mixed up with their respective religions, were antagonistic to each other, and as the orthodox learned Bráhmanas who were the repositories of Hindu law, could not consistently with their position in Hindu society, and therefore did not, associate with the *mlechchhas*, or study their law and the language in which the same was recorded. It is no doubt, true that the Káyasthas, the other important literate class among the Hindus, used to learn the language of the rulers, but their knowledge of the Mahomedan usages could have no effect on Hindu law, which was the monopoly of the Pundits who were completly ignorant of the Mahomedan law. This explains how it is that there is not even a passing allusion to the subject of Wills in the numerous works of Hindu law compiled by Bráhmanical writers during the Mahomedan rule, specially when they themselves would surely have benefited by the introduction of gifts made in contemplation of, and coming into effect after, death, as they were the recipients of pious gifts made by Hindus. It should, however, be acknowledged that the Bráhmanas were characterised more by self-denial than by selfishness, in fact, the spiritualism of the Hindus is due to the noble example of Bráhmanical self-abnegation and self-sacrifice.

The origin of Wills among Hindus cannot be traced to any influence of the Moslem law, or to any improper influence of Bráhmanas who are unjustly accused, merely on assumption and supposition, but not on the solid basis of proved facts. Charity and religious gifts are extolled in every system of religion. Bráhmanical influence was stronger before the establishment of British rule: how is it then, that Wills of Hindus came into existence for the first time under the British rule and not before, if Bráhmanical influence had anything to do with the origin of Hindu Wills? Many of the heterodox Pundits with whom Englishmen came into contact, may have been guilty of conduct justifying a low opinion of them, but orthodox Pundits were distinguished for their self-denial, renunciation, and exemplary

spirituality, by reason of which alone they could maintain their high position in Hindu society. It is no doubt true that the Pundits depended for their support on the voluntary gifts made by Hindus on the occasions of performing religious rites and ceremonies; but it is worthy of special remark that gifts were made to learned Pundits, as they had to maintain their pupils who used to live with them as members of their family, for learning the Shástras from them; they led a simple life, and were not covetious for wealth, if they got more than enough, they never amassed but spent the excess for the benefit of the needy and indigent persons.

Gifts and Wills.—The so-called early Wills were really deeds of gift or settlement made by Hindus shortly before their death and intended to operate *inter vivos*. It was often found that following the injunciion of the Shástras, Hindus in their old age, relieved themselves of worldly cares by surrendering their property to their male issue either by way of partition or by way of gift or settlement, but not by will.

The idea of making Will was not of spontaneous growth among Hindus. The people of Calcutta and other Presidency towns had the English solicitors for their legal advisers, and many Hindus sought their advice in all transactions relating to property; the solicitors did in fact, draw all deeds in English, according to the instructions of their Hindu clients who had but a smattering of English and sometimes completely innocent of it. It was an English solicitor who drafted the Will whereby his Hindu client gave power of adoption to his three executors including his widow, and to the surviving two executors in case of the widow's demise before adoption: I.L.R., 24 C., 589; 25 C., 662; & 27 C., 996 = 27 I.A., 128.

The Hindus appear to have imbibed the idea of testamentary power either from the English solicitors or from the legislative enactments already referred to. And as it is a weakness of human nature to hanker after power, the idea has gradually spread to people outside the Presidency towns, and to persons other than Zemindars. But the recognition of unrestricted testamentary power of Bengal fathers over ancestral property is not justified by the Hindu law and usages; and although the highest tribunal has pronounced that there is no distinction between the *ancestral* and the self-acquired properties as regards the father's power of disposition over them in Bengal, still this view appears to be contrary to the Dáyabhága as well as to the traditional notion of their law prevailing among the Bengali

Hindus in all districts,—and it is also inconsistent with their joint family system. And it is sometimes found that what is said to be settled law in our Courts, is unsuitable to the people, and is neither known to, nor accepted by, the generality of them, as the basis of their transactions; so the law of the Courts in some respects, is not what the people think to be their law.

Wills among Hindus are sought to be explained as "a development of the law of gifts *inter vivos*." A Will is described by the Privy Council as "a disposition of property to take effect upon the death of the donor" which "though revocable in his lifetime, is until recovation a continuous act of gift up to the moment of death, and does then operate": *Jotindra* v. *Ganendra*, 18 W.R., 359, 366.

This is a fiction, as no person retains consciousness or a sound disposing mind up to the last moment of his life. There is another fiction for explaining the post-mortem disposition of property, namely, that the deceased person continues to act beyond the period of his own death, and in order to explain the validity of a dead man's action, a distinction may be drawn between *title*, and *ownership* in the sense of personally holding and enjoying. When a person holds an estate to himself and his heirs for ever, his title subsists beyond his death, although his ownership died with him. Hence the gift or disposition which takes effect on the moment after death, is deemed to be an incident of the subsisting title. But still the difficulty remains unsolved: the title remained entirely in the deceased person up to the last moment of his life; he did not divest himself of any portion of his title during his life. Hence the deceased person must be admitted to act on the moment *after* death, if the dispositions are to be deemed *his* acts. It would be an absurd assumption; and as regards the *subsisting title*, where does it remain *after* the owner's death? It cannot subsist as if suspended in the air, and a title without being vested in a person in existence is impossible. Such metaphysical explanation of wills is useless sophistry.

Property and its incidents are creatures of law. In order to induce people to lead a life of industry and thrift, the law tells them—If you exert yourself to acquire property by the legitimate means, you will be entitled to hold the same as yours, to use and enjoy it according to your pleasure but without prejudice to the lawful rights of others, and not only you will be at liberty to make a gift or a sale or any other transfer during your life, but you are also permitted, subject to certain

restrictions, to declare your desire as to what persons are to get your property after your death, and your desire shall be carried into effect. It is only the law applicable to the deceased testator that gives effect to his dispositions; nothing else can do the same.

Practically, however, testamentary disposition appears to be an extension of gift; the people derive their conception of bequest from donation. Gift, *donatio mortis causa*, and Will appear to be successive conceptions, the former leading to the latter. There is undoubtedly a close connection between gifts and bequests.

The limits of the analogy between wills and gifts *inter vivos* which have been recognised (24 I.A., 105) by the Judicial Committee are as follows,—"The analogous law in this case is to be found in that applicable to gifts; and even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded *as to the property* which they can transfer *and the persons* to whom it can be transferred: 18 W.R., 366.

Definition of Will.—The following definition of Wills is given in the Succession Act—"Will means the legal declaration of the intention of the testator with respect to his property, which he desires to be carried into effect after his death."—Section 3.

This definition is open to objection on several grounds. Firstly, it uses the term *testator* which means the executant of a *will*, and therefore its meaning cannot be understood by one who does not know the meaning of *will*: thus this definition is tainted with a logical defect which, in Sanskrit, is called "the fallacy of mutual dependence" अन्योन्याश्रयत्वम् which is defined to be स्व-ग्रह-सापेक्ष-ग्रह-सापेक्ष-ग्रहत्वम् *i.e.*, a fault vitiating a definition in which the meaning of the term defined depends upon the meaning of another term, which again depends on the meaning of the first term. Secondly, as the term *testator* is not defined in the Act, the definition is liable to be read by substituting the word *person* for *testator*, and to be misapplied, by reason of the distinctive charateristic of *wills* being omitted in the definition, even to deeds containing conditional dispositions *inter vivos*, which are intended to be carried into effect after the death of the executant by being vested in possession, but which are not revocable: 8 W.N., 614.

The distinctive feature of a will is its *ambulatory* character; however solemnly you may execute a will, you may undo it the next moment: the test of the testamentary character of a

disposition is its revocability, (*Sita Koer* v. *Munshi Deo Nath*, 8 W.N., 614); this is stated in Section 49 of the Succession Act. But it should have been expressly made a part of the defenition which should be made clear, thus,—"Will is the legal declaration by a competent person of his intentions with respect to his property, which he desires to be carried into effect after his death, such declaration being liable to be altered or revoked by him at any time when he is competent to dispose of his property and becoming operative if not so done". But it should be observed that an instrument which is a Will does not cease to be so, by reason of a clause in which the testator says that he shall not have the power to *sell* any property, but he shall *mortgage* the same for raising money if needed: *Sagore* v. *Digambar*, 14 W.N., 174.

As all persons are not competent to make testamentary dispositions, the term *person* in the above definition of will, is qualified by the adjective *competent*.

The term *property* has not been defined either in the Succession Act, or in the General Clauses Act X of 1897, or in the Bengal General Clauses Act I of 1899, or in the Transfer of Property Act.

The word property is used in two senses: it signifies either ownership of a thing such as land or chattel, or the thing itself as the subject of the ownership A thing is *property* in relation to its owner, and a person's relation to the thing as the subject of his ownership is his *property* in the thing.

The definition of immoveable property (Act X of 1897 clause 25) says that it includes land, and benefits to arise out of land. Accordingly, the same land may be the property of more persons than one, not only as co-sharers having co-ordinate rights; but also as proprietors, tenure-holders and undertenure-holders of different degrees, the latter holding in subordination to the former, until you reach the cultivator or the actual occupant, and in some districts of Bengal there are so many as a dozen subordinate interests of different degrees, the owner of each of which calls the land his property; or also as successive owners, namely, life-tenant and remainderman or reversioner. Thus there are three modes of division of property in land, namely, *first*, division by metes and bounds or geographical or geometrical division; *second*, division by creating tenures and undertenures; and *third*, division by successive limitations, *i.e.*, by limiting the time of successive enjoyment: 4 B.L.R., O.C., 103.

Although ordinarily the term property is used to designate

a thing that is of value to us; yet if we have an abundant and inexhaustible supply of the same, easily accessible to us, then it has no marketable value or price. For instance, nothing can be of higher value to us than the air, without which life cannot exist, still it cannot be property.

Property may be defined to be a thing or a right to a thing which can fetch a price. It is extended to things which intrinsically have no value, but which are valuable as evidences of rights to receive money or profits, as for instance, bonds, debentures, government securities or other negotiable instruments, shares of joint stock companies, and the like.

A person may exercise all the rights constituting ownership, over property which belongs to a deity or a religious or charitable endowment, and which he holds as a sebait or trustee and can even alienate for the benefit of the owner, and with respect to which he can appoint his successor in the office of sebait. It has been held, that his rights over the property cannot be called his *property*, and so an instrument executed by him to appoint his successor, and intended to be operative after his death, cannot be regarded as a Will, or admitted to probate: I.L.R., 32 C., 1082.

It should, however, be noticed in this connection, that the English Wills Act, 1837 (1 Vict., c. 26), explains the meaning of Will thus,—"the word Will shall extend to a testament and to a codicil, and to an appointment by Will or by writing in the nature of a Will in the exercise of a power, and also to a disposition by Will and testament or devise, of the custody and tuition of any child, * * *, and to any other testamentary disposition." So in England the donee of a power of appointment may appoint the property by a Will, although the property is not his. The definition of Will enables him so to do. But the definition of Will in the Indian Succession Act is not so comprehensive; nevertheless the Legislature seems to be oblivious of this distinction, and appears to have the English definition in mind while enacting Section 56 of the Indian Succession Act, which contemplates "a Will made in the exercise of a power of appointment, when the property over which the power of appointment is exercised would not in default of such appointment pass to his (the testator's) executor, or administrator, or to the person entitled in case of intestacy." Unless the term *property* in the Indian definition be taken in a most comprehensive sense so as to include also property over which the testator has merely power of appointment, the said

Section 56 cannot be reconciled with the definition of Will. Similarly Section 47 which provides that "A father, whatever his age may be, may by *will* appoint a guardian for his child during minority"—also shows that the framers of the Indian Code had the English definition in their mind.

There are many cases in which testamentary documents executed by sebaits appointing their successors, were taken without dispute to be Wills and admitted to probate. Such Wills are analogous to those whereby powers of appointment are exercised. But these writings cannot come within the Indian definition of Wills, if the term *property* be strictly construed, as is done in the case of *Chaitanya* v. *Dayal*, I.L.R., 32 C., 1082.

It should be noticed that *property* in a Will unless expressly restricted to what is existing at the time of its executson, comprises what is acquired by the testator subsequently to the execution of the Will, answering the description of the property: Section 77. This is another incident whereby a Will is distinguished from a conveyance or a gift which must relate to existing property only.

Codification.—The Indian Succession Act codifies the law of succession both intestate and testamentary; but it was not originally intended for the Hindus, Sikhs, Jainas and the like who are governed by Hindu law, and who form the bulk of the population of India, although it professes to be the territorial law of British India. It was intended for the domiciled Englishmen and other Europeans, the Eurasians and the Native Christians: there having been neither personal nor territorial law applicable to them, the Courts had the difficult task of supplying the deficiency by the application of principles of equity, justice and good conscience.

The Hindus being expressly excluded from its operation, the framers of the code never troubled themselves with the consideration whether the rules propounded by them would be suitable to the Hindus, as they were legislating for the benefit of persons whose ideas, sentiments and habits were like those of Europeans; for, the Eurasians and the more respectable of the Native Christians were either Anglicized in their thoughts, feelings and habits, or sought to become so by imitating the Europeans and following their ideals. The rules are mainly and substantially the same as those of the English law with some modifications, additions and alterations.

But five years after the passing of this Act, the Hindu Wills Act No. XXI of 1870 was passed, Section 2 of which extends to

Hindu Wills a large number of Sections of the Succession Act in what is called by an eminent Judge, spasmodic method of legislation : *Cally Nath* v. *Chunder Nath*, 8 C., 391.

The preamble of the Hindu Wills Act says that it is enacted to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the Wills of Hindus, Jainas, Sikhs and Buddhists in Bengal and in the towns of Madras and Bombay. Section 2, however, shows that the whole law of testamentary succession provided in the Succession Act has, with the exception of a few sections, been extended to the Hindus. Having regard to the *subjects* enumerated in the preamble, and to the *rules* which are provided by the Act, *most* of them appear to be intended by the Legislature to be *rules of interpretation* ; and not only rules relating to the mode in which Wills are to be executed, but also those relating to the estates bequeathed and their incidents, as well as those relating to the capacity of the testator to create and to the capacity of the legatee to take the legacies, appear also to be intended to be included under *rules for execution.*

In this manner only, you can reconcile the enumeration of the subjects for which rules are enacted, with the rules themselves that are actually enacted by Section 2 of the Act.

Thus a body of rules proved by experience to be expedient and suitable for the most highly civilized nation in the world has been extended to a comparatively backward people with different family and social organisations and with different customs, habits of thought, ideals of life, and religious beliefs and sentiments and aspirations. It was assumed that rules that were adopted in England as appropriate and beneficial must be so here also. As a general rule the assumption is undoubtedly right. But it seems that in some respects it would have been better if, instead of hard and fast rules, the matter had been left to the discretion of the Courts, as for instance the rule relating to revocation of Wills. The stringent rule may lead to miscarriage of justice.

It is difficult to understand the principle upon which is founded the imperative exceptional rule that marriage shall not revoke a Hindu's will. The principle upon which a Will is revoked by marriage is, that it creates a change in a person's condition, such new duties and obligations, that they give rise to a presumption that he would not adhere to a will made before it. The principle equally applies to Hindus. It may no doubt be said that the distinction is justified by reason of polygamy. But

it is so rare, and is resorted to under such exceptional circumstances, that it cannot justly support the rule.

It must be admitted that the birth of male issue is an event of the highest importance in a Hindu's life, and this ought to operate as a revocation of a previous Will. Suppose a Hindu having no male issue, but only a daughter by his wife who was not likely to give birth to any more child, made a Will whereby he gave his whole property to his daughter; subsequently his wife died, and he was prevailed upon by relations to marry another wife, by whom he had a son, and he died thereafter leaving the son and the daughter, forgetting either to revoke or alter the Will. Can it be said that the testator intended that his estate shall go to his daughter to the exclusion of his son? Yet that must be the effect of his Will under the present law, according to which a will cannot be held revoked otherwise than by the modes laid down by the Act, (Section 57), although it is contrary to what ought, according to all right-thinking persons, to be deemed the dying intention of the testator. Accordingly it has been held that the birth of a posthumous son has not the effect of revoking a Hindu's Will devising his self-acquired property: *Subba* v. *Doraisami*, I.L.R., 30 M., 369. But the Hindu Judge Sir Subrahmania Ayyar was *dissentient*. It is submitted that if a Hindu testator does recite in his Will that he is sonless or destitute of male issue, then the default of male issue should be presumed to form the foundation of his Will, which in case he gets a son subsequently, should be construed to be intended by him to become inoperative as regards dispositions that may be presumed to be such as he would not have made, had he got a son.

By the Hindu Wills Act the provisions of the Succession Act relating to the grant of Probates and Letters of Administration had been extended to the Hindus; but subsequently the said provisions were replaced by the Probate and Administration Act No. V of 1881 which contains substantially the same rules as the Succession Act, with slight alterations. This separate Act applies to the whole of British India, and to all persons who were exempted from the Succession Act; but section 187 which makes the grant of probate (or letters of administration) absolutely necessary for establishing the right as executor (or administrator) or legatee,—has not been incorporated in the Probate and Administration Act, though it is retained in the Hindu Wills Act. The consequence is that the taking out of probate or letters of administration is optional

with those to whom the Succession Act or the Hindu Wills Act does not apply, such as the Mahomedans.

It is not necessary to enter into the details of the law embodied in these statutes; a few observations only are therefore made here on some important topics, and on certain matters that are not found in the Acts, but are contained in the decisions of our Courts.

How Wills made.—Before the passing of the Hindu Wills Act, a Hindu could make a will by word of mouth only (12 M.I.A., 1), or by writing of any form, embodying testamentary dispositions, though neither signed by the testator nor attested by witnesses, provided the same contained testamentary intention: (2 I.A., 7, 13; 3 W.R., 138). But Hindus governed by the Hindu Wills Act, must now execute wills according to the formalities prescribed by Section 50 of the Succession Act. If the instrument complies with the requirements of law as regards execution of a will, and also fulfills the conditions necessary to bring it within the definition of a will, then whatever may be its name or form it will be deemed as a will, and as such admitted to probate. A document called an *ekrar* or "agreement" and also *niyam-patra* and *ekrar* or "condition-deed and agreement," (12 W.N., 942), and another called *sambandha-nirnaya-patra* or "letter settling matrimonial alliance," (I.L.R., 36 C., 149 = 13 W.N., 291), were held to operate as wills as regarded the testamentary dispositions contained therein: the tests are whether the dispositions are to take effect, not *inter vivos*, but after the executant's death, and whether it is ambulatory and revocable at the executant's pleasure (8 W.N., 614): the mere statement by the testator in his will that "if it be necessary for him to raise money he would be at liberty to mortgage the properties but not to sell the same absolutely"—cannot be construed to render irrevocable what is called a will and contains dispositions of properties expressly stated to become operative after the executant's death; but it should be taken to merely indicate how the testator intends to act in future, nor can it have the legal effect of depriving the testator of his power of alienation: 14 W.N., 174.

Testamentary capacity.—A minor cannot make a Will (S. 46): but a Hindu who has attained the age of discretion is competent to give power of adoption to his wife; according to Hindu law, one who has completed the fifteenth year is major; and the Hindu Wills Act (s. 3) says that nothing in it shall affect any law of adoption. It seems therefore that a Hindu, whatever his age may be, can by a Will empower his widow to adopt.

A person cannot bequeath property which he could not have alienated *inter vivos*. It should, however, be observed that the converse proposition is not necessarily true in all cases. A Hindu widow or any other female heir who has a limited interest and cannot ordinarily alienate, cannot devise *inherited* property. Although they are entitled to make transfers *inter vivos* for legal necessity, yet as their interest ceases on their death, and the estate passes to the reversioner, there is nothing left upon which their will can operate. A will made by a Hindu widow whereby she devised her husband's estate inherited by her, was declared invalid during her life, in a suit brought against her by the reversioner: 31 I.A., 67. She is competent, however, to make a valid will of her Strídhan property.

A member of a Mitákshará joint family, cannot make testamentary disposition of his undivided coparcenery interest in joint property, which he cannot alienate for his personal purposes during his life and which on his death lapses, or (as is loosely stated) passes by survivorship to the surviving male members of the family, so that there is nothing left on which his will can operate.

It should, however, be noticed that although in Madras and Bombay, the Mitákshará law has been modified by the Courts in favour of purchasers for value on grounds of equity, and an alienation by a member of a Mitákshará joint family, of his undivided coparcenery interest, though made without the consent of his co-sharers, is recognised as valid by the Courts, if made for valuable consideration; yet he cannot dispose of it by Will. Such alienation is certainly inconsistent with the strict theory of joint family, and this doctrine established by modern jurisprudence by way of exception, has been, as it should be, limited by the requirements of equity; and it does not admit of extension, as if it were a settled principle of Hindu law which should be carried out to all its logical consequences: *Lakshman Dada Naik* v. *Ramchandra*, 7 I.A., 181; see *supra* pp. 229-31.

It has been held that the power of appointment is recognised by Hindu law, their being an analogy to it in the law of adoption: a person may by Will confer power on another person to appoint his property, subject, however, to the condition that the object to whom the property is to be appointed must be in existence at the testator's death: *Bai Motivahco* v. *Bai Mamoobai*, 24 I.A., 93; *Javerbai* v. *Kablibai*, I.L.R., 16 B., 492, 498.

As regards the Bengal school, it has already been stated that the father is held to have testamentary power as well over

ancestral as over his self-acquired property, without any distinction whatever, (18 W.R., 365), although a student of the Dáyabhága would be at a loss to understand how such a doctrine was deduced from that treatise admitted to be of paramount authority in Bengal.

In some systems and in the early stage of most systems of jurisprudence, the power of alienation *inter vivos* is found unrestricted, but nevertheless the power of devise is circumscribed by the claim of near and dear relations upon the testator's estate, whom he was under the obligation to maintain. Accordingly the testamentary power is limited to a certain share of the estate, the rest being subject to the law of intestate succession.

That the male issue has more than a mere claim for maintenance, upon ancestral property in the father's hand according to the Dáyabhága, cannot be questioned, and it is a general principle of Hindu law that a person is bound to provide his wife with maintenance, and is also under obligation to furnish with the means of livelihood his male issue whom he brings into existence. The Hindu law also imposes on a man the liability of maintaining his parents. A man's rights over his property is curtailed by these obligations. He cannot at any rate *give away* his property and deprive these persons of the means of subsistence.

In the Tagore case the Judicial Committee did not enter into the question as to how far the testamentary power as to ancestral property can supersede the son's claim to maintenance, but decided the case upon the assumption that it could not.

The Hindu Wills Act refers to it by saying that nothing in the Act shall authorize a testator to deprive any persons of any right of maintenance, of which he could not previously deprive by will.

It should be observed that a person governed by the Mitákshará, is competent to alienate even the ancestral property by a sale, gift or any other transfer *inter vivos*, if at the time of such alienation he has no co-parcener jointly entitled to the property; the subsequent birth or adoption of a son cannot affect the validity of the alienation so made. But a Will of ancestral property does not stand on the same footing, but is virtually revoked by the subsequent birth or adoption of a son who becomes at once entitled to such property equally and jointly with the father, and survivorship applies, if the latter dies leaving a male issue, the title by survivorship being prior to the title by devise; so that his undivided co-parcenery interest

passes to the surviving co-sharer, and there is nothing left on which his Will can operate: 6 M.I.A., 309, 345. It would depend on the state of things existing at his death whether his will would be effectual and operative, or not; it would operate on any separate and divided property, and not on joint property: 8 M H.C., 6; 15 I.A., 51; 26 I.A., 83. The result would be same if there be a son in the womb at the testator's death; *Minakshi* v. *Virappa*, I.L.R., 8 M., 89.

According to the Mitákshará law the male issue acquires a joint right by birth not only to the ancestral but also to the father's self-acquired property; but nevertheless the father's power of alienation *inter vivos* over the latter is recognised. Still because a son as co-parcener takes by survivorship and not by succession even the father's self-acquired property, a Will would have stood on the same footing as one relating to ancestral property in Southern India, but for the theory of analogy of a Will to a gift *inter vivos*, as regards the property that can be bequeathed. Hence it has been held that a Mitákshará father is competent to bequeath his self-acquired property: I.L.R., 10 B., 528, 551-5; 24 M., 429, 436-8.

Capacity to take as legatee.—In order that a person can take as legatee, it is necessary that he must be in existence at the testator's death: fœtal existence would not be sufficient if the child do not come into separate existence, in other words, if the child *in embryo* at the testator's death is subsequently born alive, he is entitled to the legacy bequeathed to him. He is deemed to be in contemplation of law, in existence at the decease of the testator, though he is not so in fact: 18 W.R., 365.

This principle is extended to a son adopted by a Hindu widow after her husband's death, and he is deemed in contemplation of law, to be in existence at the death of the adoptive father. The adoption is tantamount to birth as son of the adoptive father, and this new birth relates back to the father's death, and entitles him to take the father's estate either by inheritance or by devise. It should be observed that this exception is made in favour only of the *testator's* adopted son; it cannot apply to the adopted son of any relation of his, who cannot have a better position than that relation's real legitimate son.

A legatee must survive the testator to become entitled to the legacy; if he dies before the testator, the legacy lapses. There is an exception to this rule laid down in section 96, applicable to a legacy bequeathed to the testator's child or any other

lineal descendant, which does not lapse in case the latter dies in the testator's lifetime, leaving any lineal descendant who survives the testator, but the legacy shall take effect as if the legatee died immediately after the testator, unless a contrary intention appears by the will.

If a legatee is appointed an executor of the Will, he cannot take the legacy unless he acts, or otherwise manifests an intention to act, as executor: Section 128.

Property may be bequeathed to a person who is to hold it in trust for the benefit of others, without deriving therefrom any benefit himself; the devisee in trust is to carry into execution such of the trusts as are valid; should there be a residue left, it would go to the heir-at-law, if there be no risiduary legatee. Trusts for religious and charitable endowments are well-known.

But a testator cannot, through the intervention of trusts, create indirectly beneficiary estates of a character unauthorized by law, which he is incompetent to do directly: 18 W.R., 368.

Power may be conferred by Will on a person to appoint the testator's property: 24 I.A., 93. The power may be either general, or special. When the donor of the power authorizes the donee of the power to appoint the property to any object the donee pleases, it is called a general power of appointment. And power is called special or particular, when the donee's right of appointment is restricted to some objects designated in the Will by the testator himself. The devisee of a general power of appointment is virtually the legatee of the property over which the power is to be exercised; for, as he has the power to appoint the property to any object he may think proper, he may appoint it to himself, and in the absence of appointment it devolves as *his* property: see section 78. If no appointment is made by the donee of a special power, the property goes equally to all the objects of the power, if the Will does not provide for the event of no appointment being made: see section 79. These two sections relating to powers of appointment, have not, however, been extended to the Hindus, probably because there was then no case recognising *powers of appointment* as part of Hindu law. The first case on the subject is that of *Bai Motivahoo* v. *Bai Mamoobai*, decided in 1897: 24 I.A., 93, 105.

Unborn persons may, subject to certain restrictions, become legatees under the Hindu Wills Act, by which Sections 99 to 101 of the Succession Act are extended to Hindus. An unborn

legatee must always be described as a relation of a living person. A legacy to an unborn person who comes into existence after the testator's death, may be valid under the following conditions, (sections 99-101),—

1.—If the possession of the legacy is deferred to a time later than the death of the testator, by a prior bequest or otherwise;

2.—If the legatee comes into existence before the said later time which cannot be beyond the death of one or more living person or persons, *i.e.*, he must be in existence at the expiration of the lifetime of a person or persons living at the testator's death;

3.—When the legacy is subject to a prior bequest, it must comprise the whole of the remaining interest of the testator in the thing bequeathed; and

4.—The legacy must be given in such terms that it is not possible for the vesting being delayed beyond the lifetime of living person or persons and the minority of the unborn legatee.

This last condition is called the *rule against perpetuity* or *remoteness*. The principle being that property must not be permitted to be tied up, so as to make it inalienable. But as property can be given to an unborn person, subject to a prior estate for life to a living person, it must necessarily be tied up until the attainment of majority by the former; and hence vesting is permitted to be delayed up to that time, but not beyond it. The rule of English law according to which vesting can be postponed to an absolute period of twenty-one years after the life of living person, is also founded on the same principle; but the Indian rule is more logical.

It has already been stated that Hindus are not allowed to have the benefit of these Sections, upon the ground that they cannot make a gift to an unborn person—a proposition which appears to have been rather assumed in the Tagore case than established by unimpeachable evidence. This construction of the Hindu Wills Act does not seem to be worthy of what has been dignified as a Code by the highest tribunal.

Estates, limitations and legacies.—A Hindu can by Will create such estates only as are consistent with Hindu law. He cannot make his property descend in a new line of succession different from what is directed by Hindu law: to attempt to do so, would be assuming to legislate: 18 W.R., 364.

Estates are interests in land that may be possessed by a person; a life-estate, an estate tail, and a fee simple are the freehold estates in English law; an estate for life of either the

tenant or any other person was regarded the lowest estate worthy of acceptance by a *free man*, according to the feudal ideal, and it was deemed larger than a lease for any term of years, however long. An estate tail with succession by primogeniture is unknown to Hindu law; and a Hindu cannot create it by Will: see Tagore case.

Hindus are held competent to create contingent interests by way of remainder or by way of executory devise, upon an event happening at the latest, on the close of a life in being. With regard to the testamentary power under Hindu law, the Judicial Committee made the following observations in *Soorjeemoney Dossee's* case (9 M.I.A., 135), —

"Whatever may have formerly been considered the state of that law as to the testamentary power of Hindoos over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law, in allowing a Testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist."

In this case the testator gave his estate absolutely to his five sons in equal shares, and then added a clause of conditional defeasance, in which he provided that if any one of his sons die without leaving male issue, then his share shall not devolve on his widow, daughter or daughter's son, but shall go over to the testator's male issue then living. This gift was held valid according to the principle ennunciated in the above passage.

But it has been held by the Judicial Committee in *Norendra Nath Sircar's case* that the law has been modified by Section 111 of the Succession Act, which lays down that if no time is mentioned in the Will for the occurrence of the event upon which the gift over is made contingent, the gift cannot take effect unless the event happens before the period of payment or distribution, *i.e.*, ordinarily, before the death of the testator. Accordingly, although the facts in this case were on all fours with those of *Soorjeemoney's* case, it was held that the gift over could not take effect: 23 I.A., 18.

This Section 111 appears, from its illustrations as well as from the preamble of the Hindu Wills Act, to embody a rule of construction, though it is a hard and fast rule; and it was thought,

that if the time for the occurrence of the event be stated in the Will to be after the period of distribution, the gift would take effect on the happening of the event. But in a case,—in which the testator bequeathed to one Kasiswar a legacy subject to the condition subsequent, that if the legatee died without leaving male issue, after the expiration of nine years from the testator's death (which was also the period of distribution), then it shall go over to Monohur,—it was held by the Calcutta High Court that the gift over could not take effect, when Kasiswar did not die before the period of distribution under the Will; inasmuch as the time for the occurrence of the event was not mentioned by the words—"after the expiration of nine year from the testator's death"—which stated only one limit, namely, the commencement, the other limit *i.e.*, the end not being set forth, *time* cannot be held to be *mentioned*. It would appear that if the testator had added the words—"and within 50 (or 60 or 80) years from it,"—then in the opinion of the learned Judges, the time would have been mentioned and the requirement of the section complied with, and the gift over would have taken effect. It has also been held that the rule is not one of construction: *Monohur* v. *Kasiswar*, 3 W.N., 478.

When a testator bequeaths to one legatee a property, not absolutely, but to be enjoyed for a limited period, and his remaining interest therein to another, the latter is called *remainder* or *executory devise* under different circumstances; if the remaining interest is not bequeathed, it reverts to the testator's estate, and is called *reversion*. The distinction between the terms *remainder* and *executory devise* of English law will appear from their following descriptions:—"*A remainder* is an estate in land so limited in the instrument creating it, as to be expectant immediately upon the natural determination of a particular estate of freehold limited by the same instrument."—A *particular estate* is only a part, or *particula*, of the fee simple, being an interest less than the whole, as a lease for a term, an estate for life, or an estate tail, of which the latter two are freeholds.—"Every devise of a future interest, not preceded by an estate of freehold created by the same will, or which being so preceded, is limited to take effect before or after, and *not* at the natural determination of such prior particular estate, must then be an *executory devise*." *Bigelow on Wills*, 351.

To *limit* is to mark out or describe the extent of interest bequeathed by stating its commencement, duration, termination, &c.: and *limitation* means either act of *limiting*, or interest *limited*.

A Hindu may by will create particular estates in property excepting an estate tail, as well as remainders and executory interests whether vested or contingent as stated above.

A legacy may be either vested or contingent. A vested legacy is either vested in interest only, or vested in both interest and possession; a contingent legacy depends on the happening or non-happening of some uncertain future event.

A legacy again may be absolute or conditional: a condition is either precedent or subsequent. A condition precedent is one which must be fulfilled before the legatee can take a vested interest; but as the law favours vesting, substantial compliance with such condition is sufficient: Section 115. A condition subsequent is one on the fulfilment of which a legacy given to, and vested in one person, goes over to another person by divesting the former (Section 118); but as the law disfavours divesting, strict fulfilment of such a condition is required to give effect to the ulterior legacy: Section 119. Condition of residence is held valid, whereby the devisee forfeits the legacy by ceasing to reside in the specified house: 1 I.A., 387; 24 C, 646.

The English principle according to which in some cases a construction is voided, which involves a condition precedent, is not applicable to Hindu cases: 9 W.N., 309.

Conditions, however, that are repugnant to the gift are void. When you absolutely divest yourself of your interest in property, by giving the same to another person, so as to vest in the donee its ownership, which consists in the right of using, enjoying and disposing of it according to his pleasure, you cannot then impose any condition restricting that right, since it would be repugnant or contrary to the incidents of the transfer itself. Hence restraints on alienation, partition or enjoyment are invalid and ineffectual: 18 W.R., 365; Section 125.

A legacy may also be specific (s. 129), or demonstrative (s. 137), or general: specific legacies are liable to be adeemed (s. 139), but are not liable to abatement with general legacies, in case of deficiency of assets, (s. 136). A demonstrative legacy is neither liable to ademption (s. 140), nor ordinarily liable to abatement; but it is liable to abate, when it becomes general legacy by reason of the failure of the fund out of which it is payable, to the extent of the failure: (P.A. Act, s. 109).

Accumulation.—Hindu testators attempt to tie up property in various ways, of which a very common one is a direction to accumulate the income of the estate or any property, since the testator's death. The section 104 of the Succession Act which

deals with accumulation, and allows it only for one year in two cases, has not been applied to the Hindus; though Thellussons are not unknown amongst them. In some cases, however, accumulation is necessary, as that of the surplus income of the legacy to a minor after defraying his legitimate expenses, or when legacies and debts are directed to be paid by the accumulation of the income of property, the corpus of which is to go to some other legatee after such payment. But where the direction to accumulate is unreasonable, or unlawful, or inconsistent with, or repugnant to, the gifts made, it must be rejected as inoperative: I.L.R., 8 C., 378. It must depend on the circumstances of each case, as to how far effect can be given to such direction.

The first express decision dealing with a Hindu's power to direct an accumulation, and its limits, is the case of *Amrito Lall Dutt*, (I.L.R., 24 C., 589) in which Justice Jenkins held after discussing previous cases,—"that it is not incompetent for a Hindu with proper limitations to direct an accumulation of the income of property which under his will vests in his executors or trustees," (614-5), and that "in the absence of special provision the *limit* must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator," (615). The inference drawn by Justice Harington from the judgments in this case and the previous cases discussed therein is,—"that there is nothing *per se* illegal in a direction to accumulate made by a Hindu and that, if such a direction is neither so unreasonable in its conditions as to be void as against public policy nor given for purposes of carrying out an illegal object nor in its effect inconsistent with Hindu law, it should be given effect to:" *Rajendra* v. *Raj Coomari*, 34 C., 5, 11.

Construction of Wills.—Hindus are often found to make wills whereby the estate is given to the heirs-at-law, subject to some provisions for maintenance and management. Having regard to the facts that the Hindus believe their law to be of divine origin, and that the same is perfectly suitable to their sentiments, the presumption is in favour of the testator's intention being that the heirs are to take by descent and not by devise.

In construing a will, the object of the Court is to ascertain from its wording the *expressed* intention; and effect must be given to it, and not to *unexpressed* intention; since, to do that would be to speculate and to make a new Will for the testator: intention is to be gathered from the words of the entire Will,

taking them in their ordinary meaning, and putting on them a benignant construction: section 61; Tagore case, 18 W.R., 364.

In *Hunoómanpersaud's case* the Privy Council observed,—"Deeds and contracts of the people of *India* ought to be liberally construed. The form of the expression, the literal sense is not to be so regarded as the real meaning of the parties which the transaction discloses."

In *Soorjeemoney's case* their Lordships remarked,—"The Hindoo law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor so far as we are aware, is there any difference as to the materials from which the intention is to be collected. Primarily the words of the Will are to be considered. They convey the expression of the testator's wishes: but the meaning to be attached to them may be affected by surrounding circumstances and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the Will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the Will or the surrounding circumstances displace that assumption:" 6 M.I.A., 550.

In a case—in which by a deed of compromise and release in the English form, between the co-parceners of a joint family with respect to their joint estate, to which a widow of a deceased member in her character as his heiress was a party, a certain sum of money was paid to her, therein expressed as the share of her deceased husband, "for her own absolute and separate use,"—it was contended that these words should be taken in the sense attached to them when occurring in an English deed. But the Judicial Committee held that the money represented her husband's share in the joint property, which she took as her husband's heiress, and accordingly she took only the Hindu widow's interest therein, and those words implied that she was to enjoy them separately without interference by the co-sharers.

With respect to the applicability of the English rules of construction to instruments executed by Hindus, Justice Wilson made the following thoughtful and instructive observations in the case of *Ram Lal Sett*,—"It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between the native of this country. Rules of construction are rules designed to assist in ascertaining intention; and the applicability of many of such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing,

and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose, than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point, think differently and speak differently from Englishmen; and who have never heard of the rules in question. Even in England no one thinks of construing a mercantile contract by the same canons as a marriage settlement. There are in some points different rules for interpreting deeds and wills—wills of realty and wills of personalty, conveyances on sales, and family arrangements."—I.L.R., 12 C., 678.

The Succession Act contains many rules of construction which are taken from the English law; most of them are of universal application, but a few of them do not seem to be so. These rules with a few exceptions have been extended to Hindu Wills. Several of these rules do not appear to be quite consistent with Hindu law. For instance, the rule (s. 82) that a legatee is entitled to the whole interest of the testator in the property, would apply to a Hindu widow to whom the husband has bequeathed immoveable property; also the rule (s. 93) that if a legacy is given to two persons jointly, then on the death of one before the testator, the other takes the whole,—is inconsistent with the Bengal school according to which joint heirs or donees of land are tenants-in-common. The Judicial Committee says that—"In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property": 2 I.A., 14. But this principle cannot be followed where hard and fast rules of construction are to be applied.

The substance of the general rules of construction in the Succession Act is as follows,—The meaning of a clause is to be collected from the entire will, (s. 69), without rejecting any part admitting of reasonable construction, (s. 72); the intention must be expressed or necessarily implied by the language of the will, (s. 61); for determining what property or person is intended, evidence may be taken of facts the knowledge of which is conducive to the right application of the words (s. 62), evidence is also admissible in case of latent ambiguity (s. 67); if the thing bequeathed is sufficiently identified from its description, a part of the description may be rejected if it does not apply to any property, but not otherwise (s. 65, s. 66); when the words of the will show what person is meant then an error either in the name or in the description may be disregarded or corrected—one by the other (s. 63); a word omitted may be supplied by context (s. 64 ; the meaning of words may be abridged or extended, if the testator appears from the will to use them in that sense,

(s. 70); the same word should be taken in the same sense, (s. 73); of two meanings of a clause, that which gives it some effect should be preferred to the other according to which it has no effect (s. 71); effect is to be given to the testator's intention even partially, where effect to full extent cannot be given (s. 74); and where two clauses are irreconcileable, the last shall prevail (s. 75), according to the maxim—"The first grant and the last will prevails."

Certain expressions.—The term *son* (*putra*) in Sanskrit and also in Bengali, includes son's son and son's grandson; and *sonless* (*a-putra*) means, destitute of male issue to the third degree: 12 M.I.A., 47. But it seems that the term *a-puttra* is used in the Smriti texts, in the sense of one destitute of male issue, *however low*, and not to third degree only as limited by the commentators.

The word *Santána* means issue generally, and not male issue only: 7 W.R., 320; 24 W.R., 268.

Putra-pautrádi-krame—are words of limitation for a heritable estate, although a bequest is heritable without any such words: Section 82: 24 I.A., 76.

Santána-sreni-krame is to the same effect: 5 I.A., 138.

The term *malik* means an owner, but not necessarily an absolute owner. The term used in a bequest to a wife was held to give her a Hindu widow's estate: 10 C., 342. But the contrary view is taken in other cases: 27 A., 217. In another case this term coupled with "master and manager" in a Will, was held to mean only "karta and manager:" 3 B.L.R., O.C., 90.

The term *Uttarádhikári* means by derivation *after-owner*, but by usage *heir*. But words meaning *heir* are often used in the sense of *successor*.

The heir-at-law—can be *disinherited* only by valid dispositions in favour of other persons, not otherwise: *Tarak* v. *Prosonno*, 19 W.R., 48.

Executor.—Before the Hindu Wills Act, a Hindu executor was only a manager; but now the testator's estate is vested in the executor as trustee for the purposes of administration. But he is not a trustee for the heir in respect of the undisposed of residue, within the meaning of section 10 of the Limitation Act: I.L.R., 4 C., 455.

An administrator *pendente lite* intermeddling with the estate of a deceased person renders himself liable to be sued as *quasi* executor *de son tort* to pay his debts: *Khitish* v. *Radhika*, I.L.R., 35 C., 276.

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